IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO._____

RONALD HENRY BLYSTONE, JR.,
RICKEY LEE DURST,
BYRON D. FLAKES,
ANTHONY E. PINNICK,
JAMES ALBERT RICE, II,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Ronald Henry Blystone, Jr., Rickey Lee Durst, Byron D. Flakes, Anthony E. Pinnick, and James Albert Rice, III, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered December 9, 1976.

OPINION BELOW

The Court of Appeals entered its opinion on December 9, 1976. A copy of the opinion, affirming the judgment of conviction, is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

1. May a fine or requirement of restitution be imposed on a defendant sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §5010(a)?

STATUTORY PROVISIONS INVOLVED

United States Code - Title 18, Section 5010(a).

If the Court is of the opinion that the Youth Offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

STATEMENT OF THE CASE

RICKEY LEE DURST

Defendant Durst was charged in a two-count indictment, charging violations of 18 U.S.C. §§ 1708 and 495. On December 5, 1975, Defendant entered a plea of not guilty to both charges. On February 24, 1976, a superseding information charging a violation of 18 U.S.C. § 1701 was filed and Defendant entered a plea of guilty to the charge on that same date. The Defendant waived a Presentence Report and was sentenced to six months imprisonment, sentence suspended and placed on probation for a period of three years pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5010(a). As a condition of probation, Defendant was ordered to pay restitution in the amount of $160.00 and a fine of $100.00. Defendant noted an appeal to the District Court on February 24, 1976.

RONALD HENRY BLYSTONE, JR.

Defendant Blystone was charged with a violation of 18 U.S.C. §§ 661 and 2, theft of property from a government reservation with a value of less than $100.00. Defendant entered a plea of guilty to the charge on February 24, 1976 and

was sentenced by Magistrate Rosenberg to two years probation under the Federal Youth Corrections Act, 18 U.S.C. § 5010(a) and as a condition of probation was ordered to pay a fine in the amount of $100.00. Defendant noted an appeal to the District Court on February 25, 1976.

ANTHONY E. PINNICK

Defendant Pinnick was charged in a complaint with a violation of 18 U.S.C. § 661, theft of goods from a federal reservation with a value of less than $100.00. On April 5, 1976, Defendant entered a plea of guilty before Magistrate Clarence E. Goetz, was sentenced to a suspended sentence, and placed on probation for one year under 18 U.S.C. § 5010(a) and fined $100.00 as a condition of probation. Defendant noted an appeal to the District Court.

JAMES ALBERT RICE, II

Defendant Rice was charged in a three-count indictment alleging violations of 18 U.S.C. §§ 1708, 1701 and 495. On June 2, 1976, Defendant entered a plea of guilty to the 18 U.S.C. § 1701 charge. Magistrate Rosenberg suspended a six month jail sentence and placed Defendant on probation for two years under the terms of 18 U.S.C. § 5010(a). A fine of $100.00 was imposed as a condition of probation. An appeal to the District Court was noted.

BYRON D. FLAKES

Defendant Flakes was charged in a complaint with a violation of 18 U.S.C. § 641, theft of public money in an amount less than $100.00. Defendant entered a plea of guilty before Magistrate Rosenberg on May 26, 1976. Imposition of sentence as to imprisonment was suspended and Defendant was placed on probation for one year under 18 U.S.C. § 5010(a). As a condition of

probation, Defendant was ordered to pay a fine in the amount of $50.00. An appeal to the District Court was noted.

AS TO ALL DEFENDANTS

On December 9, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, citing its recent decision in United States v. Oliver, No. 75-2161 (4th Cir. October 5, 1976).

REASONS FOR GRANTING THE WRIT

As a result of the decision of the Fourth Circuit in this case and the recently decided case of United States v. Oliver, No. 75-2161 (4th Cir. October 5, 1976), a split of authority now exists between the federal Courts of Appeal on the issue of whether a fine or requirement of restitution may be imposed on a defendant sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. § 5010(a). Two Circuits have unequivocally decided that a fine is not permissible. United States v. Bowens, 514 F.2d 440 (9th Cir. 1975); Cramer v. Wise, 501 F.2d 959 (5th Cir. 1954); United States v. Hayes, 474 F.2d 965 (9th Cir. 1973).

Among the federal appellate courts which have decided this important and recurring issue, only the United States Court of Appeals for the Fourth Circuit has held that a fine or requirement of restitution may be imposed in conjunction with a sentence of probation under the Federal Youth Corrections Act. United States v. Durst, No. 76-1905 (4th Cir. December 9, 1976), United States v. Oliver, No. 75-2161 (4th Cir. October 5, 1976). In light of the recurring nature of this question and the irreconcilable divergence of decision in the federal Courts of Appeals, Petitioners respectfully submit that a Writ of Certiorari issue.

CONCLUSION

For the above-stated reason, the Petitioners, Ronald Henry Blystone, Jr., Rickey Lee Durst, Byron D. Flakes, Anthony E. Pinnick, James Albert Rice, II, pray this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/s/

CHARLES G. BERNSTEIN
Federal Public Defender

/s/

MICHAEL S. FRISCH
Assistant Federal Public Defender
601 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Telephone: (301) 962-3962
(FTS) 922-3962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO._____

RONALD HENRY BLYSTONE, JR.,
RICKEY LEE DURST,
BYRON D. FLAKES,
ANTHONY E. PINNICK,
JAMES ALBERT RICE, II,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Charles G. Bernstein, a member of the Bar of this Court, certifies that pursuant to Rule 33 he served the within Motion for Leave to Proceed in Forma Pauperis and the Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit on the counsel for respondent by enclosing a copy thereof in an envelope, first-class postage prepaid addressed to:

The Honorable Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Robert P. Trout, Esquire
Assistant United States Attorney
U.S. Attorney's Office
8th Floor - U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

and depositing same in the United States mails at Baltimore, Maryland, on December 22, 1976, and further certifies that all parties required to be served have been served.

/s/
CHARLES G. BERNSTEIN
Federal Public Defender

APPENDIX A

UNPUBLISHED

DEC 20 1976

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1905

United States of America, Appellee,

-v-

Rickey Lee Durst
Ronald Henry Blystone, Jr.
Anthony E. Pinnick
James Albert Rice, II
Byron D. Flakes, Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Submitted November 18, 1976 Decided December 9, 1976

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Robert Trout, AUSA for appellee; Charles G. Bernstein and Michael S. Frisch (court assigned) for appellants.

PER CURIAM:

In these consolidated cases, several youth offenders appeal judgments of the district court on the ground that a fine or restitution may not be imposed on a person sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5010(a). While the appeal was pending, we decided, in United States v. Oliver, No. 75-2161 (4th Cir. October 5, 1976), that the imposition of a fine as a condition of probation is consistent with the Act. For the reasons expressed in Oliver, we believe that a requirement of restitution is also consistent. The judgment of the district court is summarily affirmed.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, ET AL.,
Petitioners,

—*v.*—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1976
CERTIORARI GRANTED MARCH 21, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, ET AL.,

Petitioners,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N75-0828

U.S.A.

vs.

RICKEY LEE DURST

DATE	PROCEEDINGS
1975	
Nov. 11	Defendant advised of charges against him; rights to counsel and silence. Court appointed counsel (Federal Public Defender).
11/25/75	Indicted by Grand Jury; See Criminal No. 75-0828
12/1/75	Papers transmitted to Clerk.
1975	
Nov. 25	(1) Indictment for Violation of U.S.C., Title 18, §§ 1708 and 495. (Possession of Stolen Mail Matter; Uttering U.S. Treasurer's Check)
Nov. 25	(2) Order (Goetz, U.S. Mag.) dated November 11, 1975, appointing Federal Public Defender on behalf of defendant.
Nov. 25	(3) Order (Goetz, U.S. Mag.) dated November 11, 1975, releasing defendant on his personal recognizance, as therein set forth.
Dec. 5	(4) Appearance of Michael S. Frisch, Asst. Federal Public Defender on behalf of defendant.
Dec. 5	—Defendant arraigned and plead "Not Guilty" as to Counts Nos. 1 and 2 before Magistrate Rosenberg.
Dec. 18	(5) Motion of defendant to suppress statement, points and authorities in support thereof and request for hearing. (c/s)

DATE	PROCEEDINGS
1976	
Jan. 9	—Pre-trial conference held before Blair, J.
Jan. 21	(6) Request of United States Attorney for issuance of bench warrant, recommendation as to bail and Order (Blair, J.) as prayed.
Jan. 21	(7) Bench Warrant issued. (Executed 2/17/76)
Jan. 26	—Subpoenaes (3) issued on behalf of United States.
Feb. 17	(8) Order (Rosenberg, U.S. Magistrate) that defendant execute a bond in the amount of $1,000 and in third party custody of P.T.S.A. with conditions as therein more particularly set forth.
Feb. 23	(9) Motion of defendant to reduce bond and request for hearing. (c/s)
Feb. 24	(10) SUPERSEDING INFORMATION FOR VIOLATION OF U.S.C., TITLE 18, SECTION 1701. (OBSTRUCTION OF MAIL)
Feb. 24	—Defendant Arraigned and Plead Guilty before Mag. Rosenberg.
Feb. 24	(11) Consent of Defendant to be tried before a U.S. Magistrate
Feb. 24	—Defendant arraigned and plead "Guilty" before Magistrate Rosenberg.
March 2	(12) Order U.S. Atty. dismission indictment herein with leave of Court (Rosenberg, U.S. Mag.) dated February 27, 1976.
March 2	(13) JUDGMENT: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months. Execution of sentence suspended and the defendant placed on probation for a period of three (3) years. The defendant shall pay a fine in the amount of One Hundred Dollars (100.00) Said sentence imposed

DATE	PROCEEDINGS
1976	
	under the Federal Youth Corrections Act, 18 USC 5010(a). The defendant shall pay the said One Hundred Dollar (100.00) fine in installments as directed by probation officer. The defendant shall satisfactorily participate in any academic or vocational program as directed by probation officer. The defendant shall satisfactorily participate in a rehabilitation program and/or treatment program as directed by probation officer to include but not limited to a program relating to drugs. The defendant shall pay restitution in the amount of One Hundred Sixty Dollars (160.00). Order (Rosenberg, U.S. Mag.) dated Feb. 24, 1976
	APPEAL FROM MAGISTRATE
March 2	(14) Appeal from Judgment of the United States Magistrate (Rosenberg), received February 25, 1976
March 2	—Copies furnished United States Attorney.
March 2	—Copy of Rule 81 mailed to Counsel for defendant
March 15	(15) Appellant's Memorandum in Support of Appeal and Request for Hearing, received March 1, 1976. (Two copies submitted)
Apr. 14	—Status conference held before Northrop, C.J.
Apr. 26	(16) Brief of Appellee
May 11	(17) Copy of Supplemental Memorandum of Appellant.
June 25	(18) Opinion (Northrop, C.J.) (copies delivered to counsel 6/28/76 elg)
June 28	(19) JUDGMENT: That the Judgment of the United States Magistrate and the sentence thereby imposed in this case is AFFIRMED, Order (Northrop, C.J.) dated June 25, 1976: (copies delivered to counsel 6/28/76 elg)

DATE	PROCEEDINGS
1976	
June 29	(20) Notice of Appeal of Defendant. (C/M 6/30/76).

RPT:vvs/75-2286 Nov. 28, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 75-0828

(18 U.S.C. § 1708, Theft of Mail Matter; 18 U.S.C. § 495, Forging and Uttering)

UNITED STATES OF AMERICA

v.

RICKEY LEE DURST

The Grand Jury for the District of Maryland charges:

On or about the 1st day of May, 1975, in the State and District of Maryland,

RICKEY LEE DURST,

unlawfully had in his possession a United States Treasury check, number 91,531,915, payable to John Edward Herche, 3110 East Monument Street, Baltimore, Maryland 21205, in the amount of $319.60, which had been stolen from the mail, well knowing the said check to have been stolen.

18 U.S.C. § 1708

COUNT TWO

The Grand Jury for the District of Maryland further charges:

On or about the 1st day of May, 1975, in the State and District of Maryland,

RICKEY LEE DURST,

with the intent to defraud the United States, did utter and publish as true to Antonio Xipolipidis at Stanley's

Bar, East Monument Street, Baltimore, Maryland, a paper writing in the form of a check drawn upon the Treasurer of the United States with a false and forged endorsement "John E. Herche" on the back thereof, the said check being further described as bearing number 91,531,915, payable to John Edward Herche, 3110 East Monument Street, Baltimore, Maryland 21205, in the amount of $319.60, and RICKEY LEE DURST then knew said endorsement to have been false and forged.

18 U.S.C. § 495

JERVIS S. FINNEY
United States Attorney

A TRUE BILL:

Foreman

RPT:vvs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 75-0828

(Obstruction of Mail, 18 U.S.C. § 1701)

UNITED STATES OF AMERICA

v.

RICKY L. DURST

The United States Attorney for the District of Maryland charges:

On or about the 11th day of April, 1975, in the State and District of Maryland,

RICKY L. DURST

did unlawfully, knowingly and willfully obstruct and retard the passage of the mail, in that he did open a letter addressed to John Edward Herche, 3110 East Monument Street, Baltimore, Maryland 21205, which had been in a post office and authorized depository for mail matter and in the custody of a Postal Service employee before it had been delivered to the person to whom it was directed, with design to obstruct the mail of such addressee.

18 U.S.C. § 1701

JERVIS S. FINNEY
United States Attorney

United States of America vs.

United States District Court for

DEFENDANT: RICKEY L. DURST

DISTRICT OF MARYLAND

Criminal DOCKET NO.: N 75-0828

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: February DAY: 24 YEAR: 1976 for sentencing proceedings

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL AEPD Michael Erisch (Name of counsel)

PLEA

[XX] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [XX] GUILTY.

Defendant has been convicted as charged of the offense(s) of obstruction of mail

18 USC 1701 .

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months. Execution of sentence suspended and the defendant placed on probation for a period of three (3) years. The defendant shall pay a fine in the amount of One Hundred Dollars ($100.00).

Said sentence imposed under the Federal Youth Corrections Act, 18 USC 5010(a).

SPECIAL CONDITIONS OF PROBATION

The defendant shall pay the said One Hundred Dollar ($100.00) fine in installments as directed by probation officer.
The defendant shall satisfactorily participate in any academic or vocational program as directed by probation officer.
The defendant shall satisfactorily participate in a rehabilitation program and/or treatment program as directed by probation officer, to include but not limited to a program relating to drugs.
The defendant shall pay restitution in the amount of One Hundred Sixty Dollars ($160.00).

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be impos[illegible] The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period o[illegible] within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[XX] U.S. Magistrate

Paul M. Rosenberg

Date Feb. 24, 1976

Micr[illegible]med

Date MAR 16 1976

21

(13) Filed March 2, 1976

9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 76-0123

U.S.A.

vs.

RONALD HENRY BLYSTONE, JR.

DATE	PROCEEDINGS
1976	
Feb. 25	(1) Appeal from Judgment of the United States Magistrate (Rosenberg) dated Feb. 24, 1976.
Feb. 25	(2) Original Papers of United States Magistrate (Rosenberg).
Feb. 25	—Copies furnished United States Attorney.
Feb. 25	—Copy of Rule 81 Mailed to Defendant's counsel.
Mar. 15	(3) Appellant's Memorandum in Support of Appeal and Request for Hearing, received March 1, 1976. (Two copies submitted)
Apr. 14	—Status conference held before Northrop, C. J.
Apr. 28	(4) Brief of Appellee (2 copies submitted)
May 11	(5) Supplemental Memorandum of Appellant. (2 copies submitted)
June 25	(6) Copy of Opinion (Northrop, C.J.) (original filed in Crim. No. N 75-0828)
June 28	(7) JUDGMENT: That the Judgment of the United States Magistrate and the sentence thereby imposed in this case is AFFIRMED, Order (Northrop, C.J.) dated June 25, 1976. (copies delivered to counsel 6/28/76 elg)
June 30	(8) Notice of Appeal of Defendant. (C/M 6/30/76).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Magistrate's Docket No. 4-75

Case No. 64

UNITED STATES OF AMERICA

v.

RONALD HENRY BLYSTONE, JR.

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18
SECTION 2 & 661

BEFORE F. ARCHIE MEATYARD, JR.,
Bethesda, Maryland

The undersigned complainant being duly sworn states:

That on or about October 14, 1975, at Bethesda, Maryland in the District of Maryland RONALD HENRY BLYSTONE, JR., did aid and abet JAMES ROBERT DAVIS in the taking and carrying away, with intent to steal, the personal property of FANNIE CLARA KEMP, to wit, a personal checkbook, from the United States National Naval Medical Center, Bethesda, Md., the location of which is within the special maritime and territorial jurisdiction of the United States.

And the complainant states that this complaint is based on (see affidavit attached)

And the complainant further states that he believes that CHESTER E. WELLS, Special Agent, Naval Investigative Service Office, U.S. National Naval Medical Center, Bethesda, Md.; FANNIE CLARA KEMP, 6701 14th Street, N.W., Washington, D.C.; RAYMOND V. HALL, 1815 Franwall Avenue, Wheaton, Md.; RONALD HENRY BLYSTONE, JR., 110 Washington Ave., North

Vandergrift, Pennsylvania are material witnesses in relation to this charge.

/s/ Felice M. Muolto
Signature of Complainant

Special Agent, F.B.I.
Official Title

Sworn to before me, and subscribed in my presence, Nov. 6, 1975.

/s/ F. Archie Meatyard, Jr.
United States Magistrate

United States of America vs.

United States District Court for

DEFENDANT: RONALD HENRY BLYSTONE, JR.

DISTRICT OF MARYLAND

DOCKET NO. 4-75-64M

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: February 24, 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL AFPD Frisch (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of theft of property under $100.00 on a Government reservation, in violation of Title 18 United States Code, Section 661 & 2 Park

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: [illegible]

Imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of Two (2) years under the usual conditions of probation. The defendant shall pay a fine to the United States in the amount of One Hundred ($100) Dollars. Probation is imposed under Title 18 United States Code, Section 5010(a).

SPECIAL CONDITIONS OF PROBATION

The defendant shall pay fine imposed in installments as directed by his probation officer.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[X] U.S. Magistrate

Paul M. Rosenberg

DATE 2/24/76

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Crim. No. 76-0213

U.S.A.

vs.

ANTHONY E. PINNICK

DATE	PROCEEDINGS
1976	
Apr. 8	(1) Appeal from Judgment of U.S. Magistrate (Goetz).
Apr. 8	(2) Original Papers of U.S. Magistrate (Goetz).
Apr. 8	—Copies furnished U.S. Attorney.
Apr. 8	—Copy of Rule 81 mailed to Counsel for defendant.
Apr. 14	—Status conference held before Northrop, C.J.
May 11	(3) Copy of Supplemental Memorandum of Appellant.
June 25	(4) Copy of Opinion (Northrop, C.J.) (original filed in crim. no. N-75-0828)
June 28	(5) JUDGMENT: That the Judgment of the United States Magistrate and the sentence thereby imposed in this case is AFFIRMED, Order (Northrop, C.J.) dated June 25, 1976. (copies delivered to counsel 6/28/76 elg)
June 30	(6) Notice of Appeal of Defendant. (C/M 6/30/76).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Crim. # 76-0213

Magistrate's Docket No. 1-76

Case No. 328M

UNITED STATES OF AMERICA

v.

ANTHONY E. PINNICK
5505 Stonington Ave.
Baltimore, Maryland

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18
SECTION 661

BEFORE CLARENCE E. GOETZ
BALTIMORE, MARYLAND

The undersigned complainant being duly sworn states:

That on or about December 20, 1975, at Fort Meade, Military Reservation in the District of Maryland, on lands acquired for the use of the United States, and under the jurisdiction thereof, Anthony E. Pinnick did willfully take and carry away with the intent to steal or purloin the personal property of another, to wit: one (1) 10″ Ham Slicer, silver in color, made by Robson, one (1) 9″ Cooks Knife, silver in color, brown handle, made by Robson, one (1) 8″ Bread Knife, silver in color, made by Robson, one (1) 20 piece Stainless Steel Service Set made by Imperial, total value of said items being $22.50, and said items being the property of the Army and Air Force Exchange Service.

And the complainant states that this complaint is based on the fact that I, Barbara Robinson, having personally observed Anthony E. Pinnick place one (1) Ham Slicer, One (1) Bread Knife, One (1) Utility Knife and one

(1) twenty (20 Piece service set in a brown paper bag. Complainant states that Anthony E. Pinnick then looked around the Main Post Exchange for a short period of time and then departed the Exchange through the Card & Candle Shop and failed to render payment for said items.

And the complainant further states that he believes that are material witnesses in relation to this charge.

/s/ Barbara J. Robinson
Signature of Complainant

Security Agent
Main Post Exchange
Official Title

Sworn to before me, and subscribed in my presence, January 30, 1976.

/s/ Clarence E. Goetz
United States Magistrate

United States District Court for

United States of America vs.

DEFENDANT ANTHONY E. PINNICK
5505 Stonington Avenue
Baltimore, Maryland 21207

DISTRICT OF MARYLAND

Crim # 76-0213

DOCKET NO. 1-76-328M

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 4 DAY 5 YEAR 76

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Michael S. Frisch, Esquire
(Name of counsel)

PLEA

[XX] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[XX] GUILTY.

Defendant has been convicted as charged of the offense(s) of larceny of personal property of another on Ft. Meade Military Reservation

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

"The Court finds that the defendant was 18 years of age at the date of conviction, but does not now need confinement, accordingly, IT IS ADJUDGED that the imposition of sentence is suspended and the defendant is placed on probation for a period of 1 year upon the normal conditions of probation and upon the special condition that he will pay a fine to the United States in the sum of $100.00 in accordance with the directions of the probation officer. T. 18 USC Section 5010(a).

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[ ] U.S. District Judge
[XX] U.S. Magistrate

Date April 5, 1976

(2) Filed 8 April 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

76-0226

U.S.A.

vs.

JAMES ALBERT RICE, II

DATE	PROCEEDINGS
1976	
Apr. 13	(1) Indictment for the violation of U.S.C. TITLE 18, Sections 1708, 1701, and 495. (Possession of stolen mail matter, obstruct and retard the passage of mail, uttering U.S. Treasury check).
Apr. 23	(2) Appearance of Charles G. Bernstein, FPD on behalf of Defendant.
Apr. 23	—Defendant Arraigned and plead "NOT GUILTY" to all Counts, which was accepted by the Court.
Apr. 26	(3) Order (Burgess, U.S. Magis.) appointing Public Defender on behalf of Defendant, dated March 30, 1976.
Apr. 26	(4) Order (Burgess, U.S. Magis.) that Defendant be released on his personal recognizance, as therein set forth, dated March 30, 1976.
May 25	Rearraignment postponed until June 2, 1976—Defendant arrived late.
June 2	(5) Consent of Defendant to be Tried by United States Magistrate.
June 2	—Defendant rearraigned and plead "Guilty" as to Count No. 2 and "Not Guilty" as to each of Counts Nos. 1 and 3, which was accepted by the Court, before Rosenberg, U.S. Magistrate.

DATE PROCEEDINGS

1976

June 2 —"NOLLE PROSEQUI" ENTERED BY UNITED STATES ATTORNEY IN OPEN COURT AS TO COUNTS 1 AND 3, WHICH WAS ACCEPTED BY THE COURT.

June 7 (6) JUDGMENT: That the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months. Execution of sentence suspended. The defendant is placed on probation for a period of two (2) years under the usual conditions. Sentence imposed under the Young Adult Offenders Act, 18 USC 4216, extending the Federal Youth Correction Act, 18 USC 5010(a). The defendant shall pay a fine in the amount of $100.00 in installments as directed by the Probation Officer, Order (Rosenberg, U.S. Magistrate) dated June 2, 1976.

June 7 (7) Appeal from Judgment of the United States Magistrate (Rosenberg). (Rec'd by Magistrate and Clerk June 3, 1976)

June 8 —Copies furnished United States Attorney.

June 8 —Copy of Rule 81 mailed to Michael S. Frisch, AFPD

June 25 (8) Copy of Opinion (Northrop, C.J.) (original filed in Crim. No. N-75-0828.

June 28 (9) JUDGMENT: That the Judgment of the United States Magistrate and the sentence thereby imposed in this case is AFFIRMED, Order (Northrop, C.J.) dated June 25, 1976. (copies delivered to counsel 6/28/76 elg)

June 30 (10) Notice of Appeal of Defendant. (C/M 6/30/76).

DFG:JS/76-0502

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. W-76-0226-R

UNITED STATES OF AMERICA

vs.

JAMES ALBERT RICE, II

(Possession of Stolen Mail Matter, 18 U.S.C. § 1708; Obstruction of Mail, 18 U.S.C. § 1701; Uttering, 18 U.S.C. § 495)

The Grand Jury for the District of Maryland charges:

On or about the 26th day of March, 1976, in the State and District of Maryland, JAMES ALBERT RICE, II did unlawfully have in his possession a check drawn on the Treasurer of the United States, bearing check number 9,794,647, and symbol number 3051, dated March 12, 1976, in the amount of $684.12, made payable to George M. Curry, Jr., 1303 Delafield Place, N.W., Washington, D.C. 20011, said check being the contents of a letter addressed to the said George M. Curry, Jr., said letter having been stolen, taken and abstracted from the United States mails, the defendant then knowing the said check and letter to have been stolen, taken and abstracted.

18 U.S.C. § 1708

COUNT II

And the Grand Jury for the District of Maryland further charges:

On or about the 26th day of March, 1976, in the State and District of Maryland, JAMES ALBERT RICE, II did knowingly and willfully obstruct and retard the pas-

sage of the mail in that he did possess a piece of mail, with intent to delay its receipt by the addressee; to wit, a check drawn on the Treasurer of the United States, payable to George M. Curry, Jr., in the amount of $684.12, which check had been taken from a letter addressed to the said George M. Curry, Jr., 1303 Dellafield Place, N.W., Washington, D.C. 20011.

18 U.S.C. § 1701

COUNT III

And the Grand Jury for the District of Maryland further charges:

On or about the 26th day of March, 1976, in the State and District of Maryland, JAMES ALBERT RICE, II with intent to defraud the United States, did utter and publish as true and genuine, to Grace Ishamel, a paper writing in the form of a check drawn upon the Treasurer of the United States, with a falsely made and forged endorsement on the back thereof, well knowing the endorsement had been falsely forged and made, the said check being of the tenor and description following, to wit:

A check drawn upon the Treasurer of the United States, bearing check number 9,794,647, and symbol number 3051, dated March 12, 1976, in the amount of $684.12, and made payable to George M. Curry, Jr., 1303 Delafield Place, N.W., Washington, D.C. 20011.

18 U.S.C. § 495

/s/ Jervis S. Finney
JERVIS S. FINNEY
United States Attorney

A TRUE BILL:

/s/ John M. Lazur
Foreman

United States of America vs.

United States District Court for

DEFENDANT: JAMES ALBERT RICE II

DISTRICT OF MARYLAND

DOCKET NO.: N 76-0226

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: June DAY: 2 YEAR: 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL FPD Charles Bernstein (Name of counsel)

PLEA

[XX] GUILTY, and the court being satisfied that there is a factual basis for the plea, as to count II [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [XXX] GUILTY. as to count II

Defendant has been convicted as charged of the offense(s) of

Obstruction of Mail 18 USC 1701

"Nolle Prosequi" entered by United States Attorney in open court as to counts I and III which was accepted by the court.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months. Execution of sentence suspended. The defendant is placed on probation for a period of two (2) years under the usual conditions.

Sentence imposed under the Young Adult Offenders Act 18 USC 4216 extending the Federal Youth Correction Act 18 USC 5010(a)

SPECIAL CONDITIONS OF PROBATION

The defendant shall pay a fine in the amount of $100.00 in installments as directed by the Probation Officer.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[XX] U.S. Magistrate Paul M. Rosenberg

Date 6/2/76

(6) Filed 7 June 1976

MicroFilmed 11

Date JUN 17 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

76-0312

U.S.A.

vs.

BYRON D. FLAKES

DATE	PROCEEDINGS
1976	
May 28	(1) Appeal from Judgment of the United States Magistrate (Rosenberg). (Rec'd by Magistrate on 5/28/76)
May 28	(2) Original Papers of the United States Magistrate (Rosenberg)
June 1	—Copies furnished United States Attorney
June 1	—Copy of Rule 81 mailed to AFPD, Michael Frisch.
June 25	(3) Copy of Opinion (Northrop, C.J.) (original filed in Crim. No. N-75-0828)
June 28	(4) JUDGMENT: That the Judgment of the United States Magistrate and the sentence thereby imposed in this case is AFFIRMED, Order (Northrop, C.J.) dated June 25, 1976. (copies delivered to counsel 6/28/76 elg)
June 30	(5) Notice of Appeal of Defendant. (C/M 6/30/76).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Magistrate's Docket No. 8-76

Case No. 1843M

UNITED STATES OF AMERICA

v.

BYRON D. FLAKES

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18
SECTION 641

Before Paul M. Rosenberg, Baltimore, Maryland

The undersigned complainant being duly sworn states:

That on or about April 7, 1976, at Baltimore, Maryland, in the District of Maryland

BYRON D. FLAKES did steal, without authority, $7.00 in recorded U. S. Currency, said currency being the money of the U.S. Postal Service.

And the complainant states that this complaint is based on the following: The defendant came to the registry window of the Main Post Office, 900 E. Fayette St., Baltimore, Maryland, to pick up mail addressed to the U.S.S. Plymouth Rock, at 1430 hours this date. Due to previous sneak thefts from the cash drawer at this location, a silent alarm was installed on this drawer. While the postal clerk was preparing mail for the defendant, the silent alarm was activated in the Postal Security Office of the Post Office and the defendant was held in custody by security officers. After first being advised of his rights, the defendant emptied the contents of his pockets for your affiant and the $7.00 in recorded U.S. Currency was found to be in his possession. Oral admission to the theft was made by the defendant.

And the complainant further states that he believes that Security Officers D. Mahan and W. Chambers and Postal Inspector F. W. Cole are material witnesses in relation to this charge.

/s/ F. G. Widdowson
Signature of Complainant
F. G. WIDDOWSON
Postal Inspector
Official Title

Sworn to before me, and subscribed in my presence, April 7, 1976.

/s/ Paul M. Rosenberg
United States Magistrate
P. M. ROSENBERG

United States of America vs.

United States District Court for DISTRICT OF MARYLAND

DEFENDANT: BYRON D. FLAKES

Magistrate's DOCKET NO.: 8-76-1843M

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: May 26 DAY: YEAR: 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL AFPD Michael Frisch (Name of counsel)

PLEA

[XX] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [XX] GUILTY.

Defendant has been convicted as charged of the offense(s) of

theft of Government money 18 USC 641 (under $100.00)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is

SENTENCE OR PROBATION ORDER

imposition of sentence suspended as to imprisonment only and the defendant placed on probation for a period of one (1) year on the usual conditions of probation. Said probation is imposed under the Federal Youth Corrections Act 18 USC, 5010(a).

SPECIAL CONDITIONS OF PROBATION

The defendant shall pay a fine in the amount of $50.00 in installments as directed by the Probation Officer.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[XX] U.S. Magistrate

Paul M. Rosenberg

Date 5/26/76

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-75-0828
UNITED STATES OF AMERICA
v.
RICKEY LEE DURST

Criminal Action No. N-76-0123
UNITED STATES OF AMERICA
v.
RONALD HENRY BLYSTONE, JR.

Criminal Action No. N-76-0213
UNITED STATES OF AMERICA
v.
ANTHONY E. PINNICK

Criminal Action No. N-76-0226
UNITED STATES OF AMERICA
v.
JAMES ALBERT RICE, II

Criminal Action No. N-76-0312
UNITED STATES OF AMERICA
v.
BYRON D. FLAKES

Filed: June 25, 1976.

Jarvis S. Finney, United States Attorney for the District of Maryland, and Robert A. Rohrbaugh, Robert P. Trout and Daniel F. Goldstein, Assistant United States Attorneys, for the United States of America in all cases.

Charles G. Bernstein, Federal Public Defender for the District of Maryland, and Michael S. Frisch, Assistant Federal Public Defender, for the defendants-appellants in all cases.

Northrop, Chief Judge.

INTRODUCTION

Appellants, Rickey Lee Durst, Ronald Henry Blystone, Jr., Anthony E. Pinnick, James Albert Rice, II, and Byron D. Flakes, appeal sentences imposed by United States Magistrates of this District. Each of the appeals is based upon the same novel issue—whether a fine (and/or restitution) may be imposed where a defendant is sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.* (1970) [hereinafter the Act].

Facts

Rickey Lee Durst, appellant in N-75-0828, was indicted on charges stemming from the possession, forging, and uttering of a stolen United States Treasury check. On February 24, 1976, Durst appeared before United States Magistrate Paul M. Rosenberg, and pled guilty to a superseding information which charged the obstruction of mail, 18 U.S.C. § 1701 (1970). Appellant was sentenced to six months incarceration, but that term was suspended in favor of a three-year period of probation under Section 5010(a) of the Act. Additionally, appellant was ordered to pay a fine of $100 and restitution of $160 as a condition of probation.

Ronald Henry Blystone, Jr., appellant in N-76-0123, was arrested and charged with violation of 18 U.S.C. §§ 661, 2 (1970), theft of government property under $100 from a government reservation (a checkbook from

the United States Naval Medical Center, Bethesda, Md.). Blystone pled guilty to the charges before United States Magistrate Paul M. Rosenberg and was placed on probation for two years in lieu of imprisonment, pursuant to Section 5010(a) of the Act. Magistrate Rosenberg also imposed a fine of $100 as a condition of probation.

Anthony E. Pinnick, appellant in N-76-0213, was charged with theft of property on a military reservation under $100 in value, 18 U.S.C. § 661 (1970) (cooking knives, valued at $22.50). Pinnick pled guilty to that offense and was placed on probation under the provisions of Section 5010(a) for one year and ordered to pay a $100 fine by United States Magistrate Clarence E. Goetz.

James Albert Rice, II, appellant in N-76-0226, was indicted on charges of possession of stolen mail, 18 U.S.C. § 1708 (1970), obstruction of mail, 18 U.S.C. § 1701 (1970), and uttering, 18 U.S.C. § 495 (1970). The United States Attorney entered a nolle prosequi on counts I and III before Magistrate Rosenberg. Imposition of sentence was suspended and Rice was placed on probation for a period of two years under Section 5010(a), and, as a condition of probation, fined $100.

Byron D. Flakes, appellant in N-76-0312, was arrested and subsequently pled guilty to the theft of government property under $100, 18 U.S.C. § 641 (1970) ($7.00 in United States Currency belonging to the Postal Service). Magistrate Rosenberg accepted Flakes' guilty plea and sentenced him to probation for a period of one year under Section 5010(a) of the Act. Concomitantly, as a condition of probation, Magistrate Rosenberg ordered Flakes to pay a $50 fine.

From these sentences appellants appeal. Appellants contend that the imposition of a fine in conjunction with a sentence under the Act is impermissible. They base this assertion upon decisions of the United States Courts of Appeals for the Fifth and the Ninth Circuits which hold that a fine is improper where sentencing is pursuant to the Act. *United States* v. *Bowens*, 514 F.2d 440 (9th Cir. 1975); *United States* v. *Mollet*, 510 F.2d 625 (9th Cir. 1975); *Cramer* v. *Wise*, 501 F.2d 959 (5th Cir.

1974); and, *United States* v. *Hayes*, 474 F.2d 965 (9th Cir. 1973).

Federal Youth Corrections Act

The Federal Youth Corrections Act represents a Congressional awareness that young persons who are convicted of crime have, as a general rule, a higher potential for being rehabilitated to become useful citizens than do older, more mature offenders. Predicated upon this assumption, the Act provides a sentencing alternative of treatment and rehabilitation of youthful offenders under the age of twenty-two at the time of conviction. 18 U.S.C. § 5006(e) (1970).[1] Intended as an alternative to incarceration, the Act is designed to alleviate the often counterproductive punishment accorded rehabilitatable youths. In the words of the House of Representatives committee report recommending passage of the Act:

> [R]eliable statistics demonstrate . . . that existing methods of treatment of criminally inclined youths are not solving the problem. A large percentage of those released from our reformatories and penal institutions return to anti-social conduct and ultimately become hardened criminals.
>
> By herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened, and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques, with the inhibitions that come from normal contacts and counteracting prophylaxis, many of our penal institutions actively spread the infection of crime and foster, rather than check, it.

H.R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. Serv. at 3985 (1950).

The Act provides, in Section 5010, four alternatives which may be pursued by a sentencing court where

[1] The Act is generally applicable to persons between the ages of 18 and 22 years since Section 5006(e) defines a youthful offender as a person under 22 years in age and since persons under 18 are afforded completely different treatment under 18 U.S.C. §§ 5031 *et seq.* (1970).

deemed appropriate: Section 5010(a) provides for suspension of sentence and probation;[2] Section 5010(b) & (c) provide for treatment and supervision by the Attorney General;[3] and, Section 5010(d) provides for sentence as an adult if the court deems that treatment under the preceding subsections would be of no benefit to the offender.[4]

Although the Act sets forth detailed provisions concerning the various sentencing alternatives, it is silent as to whether or not fines and/or restitution can be properly levied upon a youthful offender in conjunction with the Act. Due to this lack of Congressional specificity, this Court is now called upon to ascertain what Congress intended and what would best effectuate that intent in this regard.

[2] (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

[3] (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

[4] (d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

DISCUSSION

Turning now to the cases cited by the appellants, the first case concerning the imposition of a fine in the context of the Act was *United States* v. *Hayes*, 474 F.2d 965 (9th Cir. 1973). In *Hayes*, the appellants were convicted of possession of marijuana and sentenced to the custody of the Attorney General under the provisions of Section 5010(b) of the Act, as well as being fined.[5] The ninth circuit, in its consideration of the sentence, cited *United States* v. *Waters*, 437 F.2d 722, 726 (D.C. Cir. 1970) to indicate that a combination of retributive and rehabilitative punishment was improper under the Act.[6] Therefore, it reasoned, that since a fine was retributive in nature, such a sentence was in contravention of Congressional intent. Offering Congressional history of the Act to buttress its opinion, the Court indicated that the Act sought to:

> [S]ubstitute for retributive punishment methods of training and treatment designed to correct and prevent anti-social tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation. . . .

474 F.2d at 967, citing, H.R. Rep. No. 2979, 81st Cong., 2d Sess., 4 (1950), 2 U.S. Code Cong. Serv. 3983, 3985 (1950). Hence, based upon the premise that a fine is

[5] At this juncture, it is important to note that although *Hayes* dealt with consideration of a fine under the Act, it is not directly on point with the within cases since it involved the treatment and supervision contained in Section 5010(b), not the probation provision in Section 5010(a) at issue here.

[6] The District of Columbia Circuit, in *Waters*, did, in a well-reasoned opinion, conclude that there could not be retributive and rehabilitative measures combined when sentencing pursuant to the Act. However, unlike the cases at bar (and also the *Hayes* case), there the court dealt with the combination of a *purely* punitive measure in addition to sentence under the Act—a period of incarceration.

retributive in nature, the court ruled that the combination sentence imposed was illegal.[7]

Following *Hayes*, the United States Court of Appeals for the Fifth Circuit was next to be confronted with the imposition of a fine in addition to a sentence under the Act, in *Cramer* v. *Wise*, 501 F.2d 959 (1974). There the court, adhering to the reasoning of *Hayes*, concluded that where a youthful offender is sentenced under Section 5010(b), no fine may be additionally imposed. However, the decision in *Cramer* is most noteworthy for the discussion wherein it indicated that Congressional intent could be properly interpreted to permit fines in conjunction with the Act. The court stated:

> A fair argument can be made, however, for upholding the power to impose fines in connection with YCA sentences. The language of 18 U.S.C. § 5010 (b) provides that if a youthful offender is convicted of an offense "punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of penalty of *imprisonment*, . . . sentence the youth offender to the custody of the Attorney General . . . ." (Emphasis added). By its terms the statute does not prohibit imposing monetary fines, but only precludes the im-

[7] One argument proffered by counsel, and rejected by the court in *Hayes*, deserves mention herein—that there was clear evidence that the Act was intended as a substitute for imprisonment rather than any other penalty (such as a fine). The appellant there proffered the early model of Section 5010(b) of the Act which was prepared by the Judicial Conference of the Committee on Punishment for Crime, in support of this contention. That model stated, *inter alia*, that "in lieu of the *penalty otherwise provided by law*" (emphasis added), the court may sentence the youth to custody of the Attorney General. However, Congress apparently was not content to allow the sentence imposed under the Act (Section 5010(b)) to be in lieu of all other types of punishment, since in the Act, as enacted, the wording now is that the punishment in Section 5010(b) is "in lieu of the *penalty of imprisonment*" (emphasis added). Although this important substitution mitigates somewhat persuasively against the interpretation of Congressional intent as perceived by the court in *Hayes*, the ninth circuit nevertheless chose not to accept this reasoning.

position of the penalty of imprisonment when sentencing under the Act.

501 F.2d at 961. After conceding that Congress had altered the language in the final version of the Act to make any sentence imposed pursuant to Section 5010(b) be in lieu of the "penalty of imprisonment" rather than the "penalty provided by law" in the original draft,[8] the court stated:

> It can reasonably be contended, however, that this action by Congress supports a contention that only the power to imprison (and not the power to impose fines) is precluded when sentencing under the Act.
>
> This contention draws support from other parts of the legislative history, for it seems that what Congress most wanted to avoid was the unfortunate effects of commingling youths and hardened criminals.

Id. Nevertheless, the court was not persuaded that the reasoning of *Hayes* was erroneous and held the fine unlawful.

The next case was again a ninth circuit case, *United States* v. *Mollet*, 510 F.2d 625 (1975). In *Mollet*, the court followed *Hayes* and vacated the sentences of three appellants who had been sentenced under the Act and also fined. However, this case was dissimilar to the foregoing cases in one important aspect—two of the three appellants were sentenced under Section 5010(a). Regardless of the difference, the court almost summarily applied *Hayes* as to all three appellants without even drawing a distinction between Section 5010(a) and (b).[9]

Two months subsequent to the decision on *Mollet*, the ninth circuit was again confronted with this issue in the Section 5010(a) context, *United States* v. *Bowens*, 514 F.2d 440 (1975). Again, without drawing any distinction between a Section 5010(a) and (b) case, it followed the

[8] See note 7 *supra*, for discussion on the change of language.

[9] Judge Blaine Anderson, sitting by designation, filed a noteworthy dissenting opinion in which he criticized the majority decision for its failure to distinguish between Section 5010(a) and (b).

Hayes conclusion that a fine, as a punitive measure, could not be levied in conjunction with a sentence under the Act.

Appellants in the instant case rely heavily on the foregoing cases to support their contention. However, another court, the Northern District of Illinois, recently considered this issue in an extremely persuasive decision, *United States* v. *Prianos*, 403 F. Supp. 766 (1975). In *Prianos*, Judge Marovitz reviewed the cases set forth above and concluded that a restrictive reading of the Act, such as employed in *Hayes*, is improper when dealing with Section 5010(a) cases. The court reasoned that the levying of a fine upon a youthful offender where sentenced pursuant to Section 5010(a) is, rather than a punitive measure, a sound sentencing alternative in accord with the intention of Congress.

After substantial consideration of the above-mentioned cases, as well as the legislative history of the Act, this Court is of the opinion that a fine and/or restitution is a valid concomitant of sentences under Section 5010(a). Although this decision is diametrically opposed to that reached in *Hayes*, it does not necessarily follow that we totally disagree with *Hayes* and its Section 5010(b) progeny. This Court finds the reasoning of *Hayes* persuasive when considering Section 5010(b) cases, since a fine coupled with a sentence under Section 5010(b) (which mandates extensive treatment and custody by the Attorney General) could arguably be a purely punitive measure inimical to the rehabilitative intention of the Act. *See Waters, supra.* However, although this reasoning may be correct when dealing with Section 5010(b), it would appear to be inapposite when considering Section 5010(a) cases. Section 5010(a), unlike Section 5010(b), does no more than place the youthful offender on probation. The imposition of a fine upon a person who receives only probation, where a much harsher sentence is possible, need not be considered punitive. *See Prianos, supra.* Such a fine could be consistent, as a mere condition of probation, with the rehabilitative intent of the Act. By employing this alternative, the sen-

tencing judge could assure that the youthful offender would not receive the harsh treatment of incarceration, while assuring that the offender acceps responsibility for his transgression. The net result of such treatment would be an increased respect for the law and would, in many cases, stimulate the young person to mature into a good law-abiding citizen.

Moreover, the legislative history intimated that such a sentence is permissible in that it indicated that "the power of the court to grant probation [under Section 5010(a)] is left undisturbed by the [Act]." H.R. Rep. No. 2979, 81st Cong., 2nd Sess., 2 U.S. Code Cong. Serv. 3985 (1950). Since Congress left the power to grant probation "undisturbed," it is reasonable to assume that the sentencing judge's authority under the Act should be co-existensive with that which he possesses pursuant to 18 U.S.C. § 3651 *et seq* (Cum. Supp. 1976), the general probation statute. Section 3651 fully authorizes the imposition of a fine, as well as restitution, when granting probation:

> While on probation and among the conditions thereof, the defendant—
>
> > May be required to pay a fine in one or several sums; and
> >
> > May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . .

Since the imposition of a fine is consistent with the general probation statute, it follows that Congress also intended fines to be consistent with Section 5010(a) of the Act.

Additionally, the preclusion of fines would often cause results that completely contravene the purpose of the Act. If this sentencing alternative were not available, many courts would be confronted with situations where only a sentence under the more stringent adult statutes would be suitable, thus depriving the offender of the benefits of the Act. Even if the sentencing judge chose

to grant probation and a fine under Section 3651, it would clearly inure to the detriment of the youthful offender—he would forever carry the stigma of having been convicted of a felony. Whereas, if imposition of the same sentence was pursuant to the Act, the offender would have, at a later date, the opportunity to have the conviction set aside and his record expunged through the procedure provided therein.[10]

Consequently, this Court is of the opinion that the Magistrates did not abuse their sentencing discretion by imposing fines and/or restitution upon these appellants sentenced pursuant to Section 5010(a). It is far better (and probably consistent with the legislative intent) to allow the imposition of such an innovative, but yet rehabilitatively sound sentence, than to narrowly construe the alternate sentence provided by the Act. To hold otherwise would be inimical to the very persons that the Act was designed to protect.

Therefore, in light of the foregoing analysis, IT IS, this 25th day of June, 1976, by the United States District Court for the District of Maryland, ORDERED:

1. That the Judgments and sentences thereby imposed by the United States Magistrates in each of the captioned cases BE, and the same HEREBY ARE, AFFIRMED.
2. That the Clerk of Court shall mail copies of this opinion to the Offices of the Federal Public Defender for the District of Maryland and the United States Attorney for the District of Maryland.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

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[10] Section 5021 of the Act allows the setting aside of a conviction:

> (b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-75-0828

UNITED STATES OF AMERICA

v.

RICKEY LEE DURST

JUDGMENT

Pursuant to the opinion of this Court dated June 25th, 1976, as to this and four other cases, IT IS ORDERED AND ADJUDGED as follows:

That the Judgment of the United States Magistrate and the sentence thereby imposed in the above-entitled case BE and the same HEREBY IS, AFFIRMED.

Dated at Baltimore, Maryland, this 25th day of June, 1976.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-76-0123

UNITED STATES OF AMERICA

v.

RONALD HENRY BLYSTONE, JR.

JUDGMENT

Pursuant to the opinion of this Court dated June 25th, 1976, as to this and four other cases, IT IS ORDERED AND ADJUDGED as follows:

That the Judgment of the United States Magistrate and the sentence thereby imposed in the above-entitled case BE and the same HEREBY IS, AFFIRMED.

Dated at Baltimore, Maryland, this 25th day of June, 1976.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-76-0213

UNITED STATES OF AMERICA

v.

ANTHONY E. PINNICK

JUDGMENT

Pursuant to the opinion of this Court dated June 25th, 1976, as to this and four other cases, IT IS ORDERED AND ADJUDGED as follows:

That the Judgment of the United States Magistrate and the sentence thereby imposed in the above-entitled case BE and the same HEREBY IS, AFFIRMED.

Dated at Baltimore, Maryland, this 25th day of June, 1976.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-76-0226

UNITED STATES OF AMERICA

v.

JAMES ALBERT RICE, II

JUDGMENT

Pursuant to the opinion of this Court dated June 25th, 1976, as to this and four other cases, IT IS ORDERED AND ADJUDGED as follows:

That the Judgment of the United States Magistrate and the sentence thereby imposed in the above-entitled case BE and the same HEREBY IS, AFFIRMED.

Dated at Baltimore, Maryland, this 25th day of June, 1976.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Action No. N-76-0312

UNITED STATES OF AMERICA

v.

BYRON D. FLAKES

JUDGMENT

Pursuant to the opinion of this Court dated June 25th, 1976, as to this and four other cases, IT IS ORDERED AND ADJUDGED as follows:

That the Judgment of the United States Magistrate and the sentence thereby imposed in the above-entitled case BE and the same HEREBY IS, AFFIRMED.

Dated at Baltimore, Maryland, this 25th day of June, 1976.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1905

[Filed Aug. 23, 1976, U. S. Court of Appeals
Fourth Circuit]

UNITED STATES OF AMERICA, APPELLEE

versus

RICKEY LEE DURST,
RONALD HENRY BLYSTONE, JR.,
ANTHONY E. PINNICK,
JAMES ALBERT RICE, II,
BYRON D. FLAKES,
APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

IT IS ORDERED that Charles G. Bernstein and Michael S. Frisch of Baltimore, Maryland, be, and they are hereby assigned as counsel to represent the appellants in the above-styled case.

FOR THE COURT—BY DIRECTION

/s/ William K. Slate, II
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1905

UNITED STATES OF AMERICA, APPELLEE

—*v*—

RICKEY LEE DURST
RONALD HENRY BLYSTONE, JR.
ANTHONY E. PINNICK
JAMES ALBERT RICE, II
BYRON D. FLAKES,
APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE
EDWARD S. NORTHROP, *Chief Judge*

Submitted November 18, 1976 Decided December 9, 1976

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Robert Trout, AUSA for appellee; Charles G. Bernstein and Michael S. Frisch (court assigned) for appellants.

PER CURIAM:

In these consolidated cases, several youth offenders appeal judgments of the district court on the ground that a fine or restitution may not be imposed on a person sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5010(a). While the appeal was pending, we decided, in United States v. Oliver, No. 75-2161 (4th Cir. October 5, 1976), that the imposition of a fine as a condition of probation is consistent with the Act. For the reasons expressed in *Oliver*, we believe that a requirement of restitution is also consistent. The judgment of the district court is summarily affirmed.

SUPREME COURT OF THE UNITED STATES

No. 76-5935

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 21, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 233545 87

No. 76-5935

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend that the imposition of a fine as a condition of their probation under the Federal Youth Corrections Act was unlawful. Petitioner Durst also contends that the additional requirement of restitution was unlawful.

Petitioners Durst and Rice were convicted following their pleas of guilty in the United States District Court for the District of Maryland of having obstructed the mails, in violation of 18 U.S.C. 1701. Petitioners Blystone and Pinnick were convicted following their pleas of guilty of having stolen property with a value of less than $100 from a government reservation, in violation of 18 U.S.C. 661. Petitioner Flakes was convicted following his plea of guilty of having stolen property belonging to the United States with a value of less than $100, in violation of 18 U.S.C. 641 (see Pet. 2-3).

Petitioner Durst was given a suspended sentence of six months' imprisonment and was placed on probation for three years under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); as conditions of his probation, he was fined $100 and ordered to pay $160 in restitution. Petitioner Rice was given a suspended sentence of six months' imprisonment and was placed on probation for two years under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); payment of a fine of $100 was imposed as a condition of his probation. Petitioners Blystone and Pinnick were placed on probation for two years and one year, respectively, under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); each was ordered to pay a fine of $100 as a condition of their probation. Petitioner Flakes was placed on probation for one year under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); he was ordered to pay a fine of $50 as a condition of his probation (Pet. 2-4). After having consolidated petitioners' appeals, the court of appeals affirmed per curiam on the authority of its prior decision in United States v. Oliver, petition for a writ of certiorari pending in No. 76-5632 (Pet. App.).

The decision of the court of appeals is supported by the terms of the Federal Youth Corrections Act as well as by the Act's legislative history. The provision of the Federal Youth Corrections Act under which petitioners were sentenced, 18 U.S.C. 5010(a), states that "[i]f the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation." Nothing in this provision precludes the imposition of a fine or an order requiring restitution as

conditions of probation. Indeed, a related provision of the Act, 18 U.S.C. 5023(a), expressly provides that nothing in the Act shall "be construed in any wise to amend, repeal or affect" the provisions of 18 U.S.C. 3651 "relative to probation." The latter statute specifically states, inter alia, that "[w]hile on probation and among the conditions thereof, the defendant * * * [m]ay be required to pay a fine in one or several sums * * * ."

Moreover, 18 U.S.C. 5010(b), which authorizes the commitment of youth offenders to the custody of the Attorney General for treatment and supervision, provides for commitment "in lieu of the penalty of imprisonment" that might otherwise be imposed. As the court of appeals pointed out in United States v. Oliver, supra, [1] the original draft of the Act submitted to Congress by the Judicial Conference Committee on Punishment for Crime contained somewhat different language, stating that commitment under the Act was to be "in lieu of the penalty otherwise provided by law" (Add., infra, p. 7). The court of appeals correctly concluded in Oliver that this substitution suggests that Congress "intended to preclude only the power to imprison in an ordinary prison rather than in a youth facility when sentencing under the Act" (ibid.).

Finally, the legislative history of the Federal Youth Corrections Act confirms that the Act's principal purpose was to promote the rehabilitation of youthful offenders. E.g., H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4 (1950). Imposition of a fine is not inconsistent with that goal. Indeed, imposition of a fine may assist in the rehabilitation process -- particularly

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1/ A copy of the court of appeals' opinion in Oliver is attached (Add., infra).

when, as here, the court chooses to place the defendant on probation -- by impressing upon the defendant the seriousness of his conduct and the undesirability of repeating it. Moreover, a requirement of restitution simply obligates the defendant to return to his victim the proceeds of his offense. It thus advances rather than detracts from the policy of rehabilitation.

Although we thus believe that the court of appeals' decision is correct, we recognize that the decision conflicts with decisions of the Ninth Circuit (United States v. Bowens, 514 F. 2d 440 (per curiam); United States v. Mollet, 510 F. 2d 625 (one judge dissenting)). The rationale of the decision is also at least arguably inconsistent with the decision of the Fifth Circuit in Cramer v. Wise, 501 F. 2d 959, holding that a court may not commit a defendant for treatment and supervision under 18 U.S.C. 5010(b) and, at the same time, require payment of a fine. Accord, United States v. Hayes, 474 F. 2d 965 (C.A. 9). We therefore do not oppose the granting of the petition.[2/]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

2/ We have suggested in our memorandum in United States v. Oliver, supra, that if the Court decides to grant the petition in this case, the petition in Oliver should be held pending a decision here on the merits. The reason for that suggestion is that this case involves an order requiring restitution as well as an order requiring the payment of fines. Even if a court may not impose a fine as a condition of probation under 18 U.S.C. 5010(a), we believe that an order requiring restitution is entirely proper.

ADDENDUM

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2161

UNITED STATES OF AMERICA

Appellee

v.

MICHAEL CORRELL OLIVER

Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued April 9, 1976 Decided October 5, 1976.

Before CRAVEN and WIDENER, Circuit Judges, HADEN, District Judge*.

Bennie L. Dunkum [court-appointed counsel] for Appellant; Joseph L. Cioline, Attorney, Department of Justice (William B. Cummings, United States Attorney, David A. Schneider, Assistant United States Attorney, Richard L. Thornburgh, Assistant Attorney General and Robert L. Keuch on brief) for Appellee.

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* United States District Court for the Northern and Southern Districts of West Virginia, sitting by designation.

WIDENER, Circuit Judge:

The sole question raised on this appeal is whether the imposition of a fine as a condition of probation is compatible with the rehabilitative purposes of the Youth Corrections Act, 18 USC § 5010. We are of opinion that it is and affirm.

The appellant in this action, Michael Oliver, pleaded guilty on October 10, 1972 before the United States District Court for the Western District of Virginia to a charge of distributing marijuana, a Schedule I controlled substance, in violation of 21 USC § 841(a)(1). Because of his status as a youth offender under 18 USC § 4209, he was eligible for sentencing under the Youth Corrections Act. Accordingly, the court imposed the following sentence:

> "IT IS ADJUDGED that the defendant is sentenced to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to the Federal Youth Corrections Act, 18 USC § 5010(b), and the execution of the sentence is suspended

> and defendant is placed on probation for a period of THREE (3) YEARS pursuant to 18 USC § 5010(a), and fined the sum of $1500, to be paid as directed by his supervising probation officer."

Effective January 3, 1973, jurisdiction over Oliver during the period of his probation was transferred to the Eastern District of Virginia where he maintained his permanent residence. On September 23, 1975, Oliver's probation officer made complaint to the United States District Court for the Eastern District of Virginia charging that he had not been complying with the special condition of his probation in that he had not adequately kept up with his fine payments. Oliver's probation officer requested a hearing to determine whether probation should be revoked.

A hearing was held on the complaint on September 29, 1975, at which time it was determined that Oliver had paid but $675 of the original $1500 fine imposed instead of $50 per month which Oliver and the probation officer had agreed should be paid. Based

upon this, the court construed the sentence of the Western District to be a fine as a condition of probation and found it had been violated by non-payment. Oliver's period of probation was extended for a period of one year from October 9, 1975 (the expiration date of the original probation period), and the balance due on the original fine was ordered paid within three months.

Oliver contends here, as he did at the hearing when his probation was extended, that the imposition of a fine as a condition of probation is impermissible under 18 USC § 5010(a), which provides:

> "If the court is of opinion that the youth offender does not need commitment it may suspend the imposition or execution of sentence and place the youth offender on probation."[1]

---

1. § 5010(b) provides:

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter."

He further asserts that the order below extending the probation and requiring the payment of the fine, which was brought about by, and based upon, his failure to pay the fine in question, must be set aside.

In support of his position as to the propriety of fines under the Youth Corrections Act, the appellant cites a series of cases from the Ninth Circuit. See United States v. Hayes, 474 F2d 965 (9th Cir. 1973); United States v. Mollet, 510 F2d 625 (9th Cir. 1975) (one judge dissenting); United States v. Bowens, 514 F2d 440 (9th Cir. 1975). In Hayes, the court, after concluding that the imposition of a fine was punitive in nature, found that a combination of rehabilitative confinement under 18 USC § 5010(b) and a fine was improper under the Youth Corrections Act. This position was followed in Mollet and again in Bowens and extended its prohibition to suspended sentences imposed under 18 USC § 5010(a), being of opinion that a trial court's election to commit a youthful offender for rehabilitative treatment under the alternative sentencing provisions of the Youth Corrections Act foreclosed the imposition of a fine, certainly,

and probably even the restitution of stolen funds, as a condition of probation.

The Fifth Circuit, in Cramer v. Wise, 501 F2d 959 (5th Cir. 1975), has agreed with Hayes, thus lending support to the defendant's position.[2]

With deference to those cases, we are unpersuaded that the imposition of a fine is inconsistent with the purposes of the Youth Corrections Act. We begin with the observation, as did the court in Cramer, p. 961, that the Youth Corrections Act, by its terms, does not prohibit the imposition of monetary fines, but only precludes the imposition of a prison sentence.

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2. Hayes and Cramer are distinguishable on their facts from the case at hand, while Mollet and Bowens are not. The defendant properly does not rely on United States v. Waters, 437 F2d 722 (D.C. Cir. 1970), and the case is mentioned here only to indicate it has not been overlooked.

Moreover, the statutory language represents a significant change from the original draft of the Act submitted to Congress by the Judicial Conference Committee on Punishment of Crimes. The Conference draft provided:

> "[T]he court may, as a penalty for the offense and in lieu of the penalty otherwise provided by law, sentence the youth offender to the custody of the Authority for treatment and supervision until discharged. . . ." [Emphasis added]

See Cramer at 961. Rather than adopting the broad language of the Conference, Congress chose to amend the draft to read "in lieu of the penalty of imprisonment," 18 USC § 5010(b), rather than "in lieu of the penalty otherwise prescribed by law" as used in the Committee draft. It would appear, therefore, that Congress intended to preclude only the power to imprison in an ordinary prison rather than in a youth facility when sentencing under the Act. Of course, the length of the sentence is also affected. As such, neither the statutory language nor the Act's legislative history supports the interpretation contended for by the defendant.

In addition, we are of opinion that an interpretation of the Act which would preclude the trial court from imposing a fine as a condition to probation would not only be contrary to the literal wording of the statute, but would also diminish the liberal use of the probation alternative. This was held in United States v. Kitson, No. 74-211-ORL-Cr-R (M.D. Fla. 1975), in which a sentencing judge construed Hayes as only limiting the power to impose a fine in addition to commitment under § 5010(b), not as a condition of probation when commitment was suspended under § 5010(a). The court in Kitson relied on 18 USC § 3651 which expressly authorizes payment of "a fine in one or several sums" as a condition of probation. And 18 USC § 5023 of the Act specifically provides that nothing in the Act shall be "construed in any wise to amend, repeal, or affect the provisions of [§ 3651 et seq]".

Other similar reasons are equally persuasive. As the legislative history points out, United States Code Congressional Service, Vol. 2, 81st Congress 2d Session, 1950, p. 3891, et seq, the statute is based on the Borstal system in England in use for more than

seventy years. The three cardinal principles which dominate that system are flexibility, individualization, and emphasis on the intangibles. Flexibility there is said to mean that a premium is placed on experimentation and originality. In Dorzynski v. United States, 418 US 424 (1974), at p. 436, the court stated that "[t]he legislative history clearly indicates that the Act was meant to enlarge, not to restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort," and on page 437 it continued "[t]hus apart from the discretion vested in administrative agencies for those committed under the Act,. . .the Act was intended to broaden the scope of judicial sentencing discretion to include the alternatives of treatment or probation thereunder."

One principal difference in treatment is that for ordinary criminals confinement is in a penitentiary, while youth offenders are first classified and then confined for correctional treatment in a youth facility, segregated from other offenders. See § 5011. Another incidental benefit is that a youth offender upon release from confinement or probation may receive a certificate setting aside his conviction. See § 5021.

In view of the fact that we think Congress intended to increase the flexibility of the remedies a district judge might use in sentencing, that is to say it meant to increase the alternatives a district judge may resort to, we are of opinion that the denial of the power to impose a fine in connection with probation would not be consistent with congressional intent. It seems to us that taking away the power of the district courts to impose fines in connection with probation would decrease, rather than increase, the alternatives available to the district courts. The dissent in Mollet and Kitson agree with this reasoning.

We are not unmindful of the fact that the theme of the cases taking the opposite view is that fines are necessarily retributive punishment and are inconsistent with rehabilitative treatment.[3] Yet, by permitting district judges to impose fines in connection with probation as another degree of punishment rather than leaving the district judge the more circumscribed alternatives of probation or confinement, is the district court not placed in a better position to do substantial justice and to avoid the confinement of the youth offender in more cases than would otherwise be possible? We think it would.

The judgment of the district court is accordingly

AFFIRMED.

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3. That a fine may in a sense be retributive, does not, we think, make it necessarily inconsistent with rehabilitation, especially as here when it enables a district judge to have a greater range of remedies at his disposal and may enable him in countless cases to dispose of the matter without confinement.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

CHARLES G. BERNSTEIN
Federal Public Defender
MICHAEL S. FRISCH
Assistant Federal Public Defender
601 U. S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Telephone: (301) 962-3962

Attorneys for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, affirming the fines and restitution ordered by the United States Magistrates, was unpublished. The opinion is *United States v. Durst* (No. N-75-0828), *Blystone* (No. N-76-0123), *Pinnick* (No. N-76-0213), *Rice* (No. N-76-0226), and *Flakes* (No. N-76-0312). (A. 27). The cases were joined together by the District Court, and decided by Chief Judge Edward S. Northrop on June 25, 1976. The decision of the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit in an unpublished opinion on December 9, 1976. *United States v. Durst, et al.*, (No. 76-1905) (*per curiam*). (A. 44).

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1). The Petition for a Writ of Certiorari was filed on December 27, 1976, within the time limit required by Rule 22.2 of the Rules of the Supreme Court.

Statutory Provision Involved

18 United States Code, Section 5010. Sentence.

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation."

Question Presented for Review

May a fine or requirement of restitution be imposed on a defendant sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §5010(a)?

Statement of the Case

Rickey Lee Durst

Defendant Durst was charged in a two-count indictment, charging violations of 18 U.S.C. § §1708 and 495. (A. 5-6). On December 5, 1975, Defendant entered a plea of not guilty to both charges. On February 24, 1976, a superseding information charging a violation of 18 U.S.C. §1701 was filed. (A. 7). Defendant entered a plea of guilty to the charge on that same date. The Defendant waived a Presentence Report and was sentenced to six months imprisonment, sentence suspended and placed on probation for a period of three years pursuant to the Federal Youth

Corrections Act, 18 U.S.C. §5010(a). As a condition of probation, Defendant was ordered to pay restitution in the amount of $160.00 and a fine of $100.00. (A. 8). Defendant noted an appeal to the United States District Court for the District of Maryland on February 24, 1976.

On December 22, 1976, Defendant Durst appeared before Magistrate Rosenberg on an alleged violation of probation. A violation was found, probation revoked, and a three month term of imprisonment as an adult was imposed. A "no benefit" finding was made. Defendant was released from custody on February 26, 1977.

Ronald Henry Blystone, Jr.

Defendant Blystone was charged with a violation of 18 U.S.C. §661 and 2, theft of property from a government reservation with a value of less than $100.00. (A. 10-11). Defendant entered a plea of guilty to the charge on February 24, 1976 and was sentenced by Magistrate Rosenberg to two years probation under the Federal Youth Corrections Act, 18 U.S.C. §5010(a), and as a condition of probation was ordered to pay a fine in the amount of $100.00. (A. 12). Defendant noted an appeal to the District Court on February 25, 1976.

Anthony E. Pinnick

Defendant Pinnick was charged in a complaint with a violation of 18 U.S.C. §661, theft of goods from a federal reservation with a value of less than $100.00. (A. 14-15). On April 5, 1976, Defendant entered a plea of guilty before Magistrate Clarence E. Goetz, was sentenced to a suspended sentence, and placed on probation for one year under 18 U.S.C. §5010(a) and fined $100.00 as a condition of probation. (A. 16). Defendant noted an appeal to the District Court.

James Albert Rice, II

Defendant Rice was charged in a three-count indictment alleging violations of 18 U.S.C. § §1708, 1701 and 495. (A. 19-20). On June 2, 1976, Defendant entered a plea of guilty to the 18 U.S.C. §1701 charge. Magistrate Rosenberg suspended a six month jail sentence and placed Defendant on probation for two years under the terms of 18 U.S.C. §5010(a) as made applicable to Defendant under 18 U.S.C. §4216. A fine of $100.00 was imposed as a condition of probation. (A. 21). An appeal to the District Court was noted.

Byron D. Flakes

Defendant Flakes was charged in a complaint with a violation of 18 U.S.C. §641, theft of public money in an amount less than $100.00. (A. 24-25). Defendant entered a plea of guilty before Magistrate Rosenberg on May 26, 1976. Imposition of sentence as to imprisonment was suspended and Defendant was placed on probation for one year under 18 U.S.C. §5010(a). As a condition of probation, Defendant was ordered to pay a fine in the amount of $50.00. (A. 26). An appeal to the District Court was noted.

As To All Defendants

The appeal of each defendant was consolidated by the United States District Court, which affirmed each sentence on June 25, 1976. (A. 27-42). On December 9, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, citing its recent decision in *United States v. Oliver,* 546 F.2d 1096 (4th Cir. 1976). (A. 43-45). A Petition for a Writ of Certiorari was filed in the United States Supreme Court on December 27, 1976. The Petition was granted on March 21, 1977.

SUMMARY OF ARGUMENT

These cases present an issue of statutory construction for the Court. Petitioners submit that the sentencing alternatives provided by the Federal Youth Corrections Act, 18 U.S.C. §5010(a)-(d) are exclusive of the sentencing provisions of any other statute as well as of each other. *Cramer v. Wise,* 501 F.2d 959 (5th Cir. 1974). As such, reference to the substantive statute under which the youth offender is found guilty for purposes of imposing a fine is improper.

The imposition of a sentence under the Federal Youth Corrections Act envisions rehabilitative treatment for the offender rather than retributive punishment. *United States v. Mollet,* 510 F.2d 625 (9th Cir. 1975); *United States v. Hayes,* 474 F.2d 965 (9th Cir. 1973). The imposition of a punitive fine is inconsistent with the rehabilitative intent of the Act. *United States v. Hix,* 545 F.2d 1247 (9th Cir. 1976).

Although no Federal Court of Appeals presently takes the position that a requirement of restitution is not permitted by the Act, Petitioners submit that to permit restitution would allow sentencing courts to, in effect, impose a fine. This could well frustrate the intent of Congress with regard to the scope of the penalty provisions of the Federal Youth Corrections Act. Further, since the Act is an exclusive sentencing provision, any sentence over and above the alternatives clearly set out in the statute is improper.

ARGUMENT

I.

A FINE OR REQUIREMENT OF RESTITUTION MAY NOT BE IMPOSED ON A DEFENDANT SENTENCED UNDER THE PROVISIONS OF THE FEDERAL YOUTH CORRECTIONS ACT, 18 U.S.C. §5010(a).

It is the position of the Defendants that no fine or requirement of restitution may be imposed on a person sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §5010(a). Defendants respectfully urge that the District Court and Fourth Circuit Court of Appeals erred in their affirmances of the imposition of said fines and restitution by the Magistrates. In its opinion, the District Court held that the imposition of fines and restitution could be consistent with the rehabilitative intent of the Act and that to inhibit the power of the sentencing judge to impose a fine might deny the benefits of the Act to otherwise qualified young offenders. *United States v. Durst, et al.*, (Nos. N-75-0828, N-76-0123, N-76-0213, N-76-0226, N-76-0312) (June 25, 1976) (Slip Op. at 11-13). The decision of the District Court was affirmed by the United States Court of Appeals for the Vourth Circuit, *United States v. Durst, et al*, (No. 75-1905) (4th Cir., December 9, 1975) (*per curiam*).

The Fourth Circuit, in holding that fines are not prohibited by the imposition of sentence under the Federal Youth Corrections Act in *United States v. Oliver*, 546 F.2d 1096 (4th Cir. 1976), found persuasive a change by Congress of the language in the original draft of the Act from "in lieu of penalty otherwise provided by law" to "in lieu of penalty of imprisonment" in 18 U.S.C. §5010(b). The Court read this change in conjunction with 18 U.S.C. §5023, which provides that nothing in the Act shall be "construed in any wise to amend, repeal, or affect the provisions of [§3651 et seq.]." *Oliver* at 1099. The Court also held that the power to impose a fine would promote the flexibility in sentencing intended by the Act. *Accord*, *United States v. Prianos*, 403 F. Supp. 766 (N.D. Ill. 1975).

Defendants respectfully contend that the decision of the Fourth Circuit is erroneous for a simple yet compelling reason. This reason is that the sentencing alternatives of the Federal Youth Corrections Act act as a substitute for the penalties set out in the statute under which the defendant is found guilty. It is apparent that the change in language in 18 U.S.C. §5010(b) was not intended to permit imposition of a fine, but merely to make absolutely clear that imprisonment of one found to be a Youth Offender was not permissible. The Court should read 5010(b) in its entirety:

> "(b) If the court shall find that a convicted person is a youth offender, *and the offense is punishable by imprisonment under applicable provisions of law other than this subsection*, the court may in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter;" (Emphasis added).

Since the penalties relative to both imprisonment and fines are supplanted by the use of the Act, and no provision is made for a fine within the sentencing scheme of the Act, no authority to impose a fine or restitution exists when the Act is applied. It should be noted that the Act has been "accurately described as the most comprehensive federal statute concerned with sentencing." *Dorszynski v. United States*, 418 U.S. at 432 (1973). It would have been a very simple matter for Congress to add language which would clearly provide for the imposition of a fine or restitution up to the amount provided for in the statute under which a youth offender could have been sentenced, if Congress had so intended. Although the general probation statute, 18 U.S.C. §3651, permits the imposition of a fine in conjunction with a probation sentence, the fine can only be imposed when the statute under which the defendant is sentenced specifically provides for a fine. Since the Federal Youth Corrections Act makes no such specific provision, a fine is impermissible when an offender is sentenced under its provisions. It is axiomatic that

doubts concerning the punishment fixed by Congress for a federal offense must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348 (1971); *Bell v. United States*, 349 U.S. 81, 84 (1955).

An analogous situation to the question posed in these cases would result if an individual was convicted of an offense in violation of 18 U.S.C. §2111. The penalty for such a violation, as set out in the statute, is imprisonment for not more than fifteen years. No provision for a fine exists under the statute. Of course, the sentencing judge could place the offender on probation as provided for by 18 U.S.C. §3651. While the probation statute permits a fine as a condition of probation, the substantive statute under which the offender is sentenced does not. Thus, a fine could not be imposed. Defendants submit that the same holds true for the Federal Youth Corrections Act.

In a recent case before the United States District Court for the District of Maryland, it was held that, when a defendant is sentenced under 18 U.S.C. §5010(b), after a plea of guilty to a violation of 21 U.S.C. §841(b)(1)(B), an offense which *requires* a special parole term of two years, that the special parole term could not be imposed because it did not apply to one sentenced as a youth offender. Defendant in that case was sentenced under the provisions of 18 U.S.C. §4209, the Young Adult Offenders Act. *United States v. Coleman*, 414 F. Supp. 961 (D. Md. 1976). The District Court found that the Federal Youth Corrections Act was an alternative sentencing provision. The Court went on to state: "Courts of Appeal have generally held that a defendant who is sentenced under the provisions of the Youth Corrections Act or the Young Adult Offenders Act is not subject to the imposition of the panoply of punishments generally prescribed for adults convicted of the specific offense for which the sentence is imposed." *Id.* at 963, citing, among other cases, *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970); *United States v. Hayes*, 474 F.2d 965 (9th Cir. 1973); *United States v. Bowens*, 514 F.2d 440 (9th Cir. 1975); *Cramer v. Wise*, 501 F.2d 959 (5th Cir. 1974).

In *United States v. Bowens*, 514 F.2d 440 (9th Cir. 1975), the defendant entered a plea of guilty to embezzlement of bank funds in the amount of less than $100.00 in violation of 18 U.S.C. §641. At the time of her plea, the defendant was 18 years of age and was sentenced to one year probation under and pursuant to 18 U.S.C. §5010(a) conditioned upon restitution in full and payment of a $200.00 fine. After the defendant had completed two months of her probation, the Magistrate set aside the original sentence and resentenced the defendant to one year probation and a fine of $200.00 under 18 U.S.C. §5010 (d) and 18 U.S.C. §3651, stating as his reason that it was his policy to exact fines from persons who have gained monetarily from illegal acts so as to teach them a lesson. On appeal from the Magistrate's sentence, the matter was remanded with directions that the Magistrate specifically find whether or not defendant would benefit from the application of the Youth Act. On remand, the Magistrate found that the defendant would benefit under the Act, but only if a fine could be imposed, and that if it could not be imposed, she should be sentenced as an adult. *Id.* at 441. The case was then returned to the District Court, which affirmed the sentence of probation and fine as previously imposed by the Magistrate. The Ninth Circuit specifically posed the question of whether a Court may impose probation pursuant to Section 5010(a) conditioned upon restitution of embezzled funds and the payment of a fine and answered that question in the negative.

In so holding, the *Bowens* Court cited the case of *United States v. Mollet*, 510 F.2d 625 (9th Cir. 1975). In this case, the Defendant Mollet, age 22, was fined $1,000.00 and placed on five years probation under the provisions of 18 U.S.C. §5010(a). A like sentence was imposed on co-defendant Moxley. Citing *United States v. Hayes*, 474 F.2d 965 (9th Cir. 1973), the *Mollet* Court held that punitive fines are inconsistent with the rehabilitative theory and provisions of the Youth Corrections Act. *Mollet* at 626.

In *United States v. Hayes*, the defendants were sentenced under the provisions of 18 U.S.C. §5010(b) for treatment and supervision. The Court also imposed a fine of $2,000.00 on

defendant Hayes and $1,000.00 on defendant Meicke. The *Hayes* Court held that the Youth Corrections Act did not provide for a fine when the youth offender is committed under the Act. In so holding, the Court stated:

> "...The Federal Youth Corrections Act is an alternative sentencing provision. At the discretion of the Judge, the youth offender deemed treatable under the Act can be sentenced to treatment rather than punishment under the applicable penalty provided by law. A combination of rehabilitative treatment and retributive punishment is not intended and is improper." *Id.* at 967.

The *Hayes* Court also makes reference to the case of *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970), a case which points to the report of the House Committee that recommended the passage of the Youth Corrections Act: "The underlying theory of the [Act] is to substitute the retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. Rep. No. 2979, 81st Cong., 2nd Sess., 2 U.S.C. Cong. Serv. pp. 3983, 3985. (1950).

Further support for this position is found in the case of *Cramer v. Wise*, 501 F.2d 959, 962 (5th Cir. 1974), which considered the validity of a fine imposed in connection with the commitment of a youth offender for treatment under the Youth Corrections Act, 18 U.S.C. §5010(b).

In *Cramer*, the Court stated:

> "We are of the opinion...that judges utilizing the Youth Corrections Act are limited to the options specified in the Act, and that fines may not be imposed on individuals sentenced under the Act. Initially, the clearly punitive fine imposed here is inconsistent with the expressed rehabilitative purposes of the Act. Secondly, a closer reading of the statute itself refutes the result reached by the lower court. Provisions of 18 U.S.C. §5010(a), (b), (c) and (d) are progressive in nature and exclusive of each other. It would deem illogical to conclude that detailed provisions, so obviously exclusive of each other, are not also exclusive of provisions not contained within the Act which the Act was designed to supplant."

While most cases dealing with the propriety of the imposition of a fine or the requirement of restitution deal with the provisions of 18 U.S.C. §5010(b), recent case law demonstrates that imposition of such conditions under 18 U.S.C. §5010(a) is likewise in excess of the permissible limits of the Youth Corrections Act. *Mollet, supra* and *Bowens, supra.* Thus, the imposition of a fine and the order of restitution by the Magistrates in the cases at bar is in excess of the punishment permitted by the statute.

As to the issue of the propriety of the requirement of restitution imposed in the case of defendant Durst, it must be frankly conceded that the Ninth Circuit has recently concluded that restitution is permissible under the Federal Youth Corrections Act. *United States v. Hix*, 545 F.2d 1247 (9th Cir. 1976). The Court distinguished a fine from restitution due to the fact that a fine is inherently punitive in nature, while restitution is essentially rehabilitative. It is, however, a real concern that sentencing courts may use restitution as a vehicle to accomplish that which is not permitted by the statute. Further, since the Federal Youth Corrections Act is an exclusive sentencing statute, any sentence beyond the limits of the Act is improper.

It may be argued by the Government that the issue of restitution is moot in that defendant Durst has been found to be in violation of his probation, had probation revoked, and completed his term of imprisonment upon revocation. Defendant Durst sumits his case is not moot because the sentence imposed could have detrimental consequences to defendant Durst in the future should he be sentenced upon a criminal conviction. A sentencing judge might well not consider a fine or restitution if Durst had been properly ordered to pay restitution in a previous case. Further, it is undisputable that a Motion to Correct an Illegal Sentence, which is the essence of this appeal, is cognizable at any time. Federal Rules of Criminal Procedure, Rule 35, *Byrnes v. United States*, 408 F.2d 599 (9th Cir.), *cert. denied*, 395 U.S. 986 (1969).

CONCLUSION

For the reasons stated in this brief, Petitioners respectfully pray this Honorable Court vacate the sentences imposed by the United States Magistrate in each case, and remand for re-sentencing with directions to strike from each sentence the requirement of payment of the fine and, in the case of defendant Durst, restitution. It is further prayed that this Honorable Court enter an Order directing the Clerk of the United States District Court for the District of Maryland to reimburse all fines previously paid by Petitioners.

Respectfully submitted,

/s/ Charles G. Bernstein
CHARLES G. BERNSTEIN
Federal Public Defender

/s/ Michael S. Frisch
Assistant Federal Public Defender
601 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Telephone: (301) 962-3962

Attorneys for Petitioners

No. 76-5935

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
MARION L. JETTON,
Assistant to the Solicitor General,
JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (A. 44–45) and the district court (A. 27–37) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1976 (See A. 44–45). The petition for a writ of certiorari was filed on December 27, 1976, and was granted on March 21, 1977 (A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a fine or a requirement of restitution may be imposed as a condition of probation under the Federal Youth Corrections Act.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 5010, as amended, Pub. L. 94–233, 90 Stat. 232, provides as follows:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
>
> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense

> or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.
>
> (d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.
>
> (e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.

18 U.S.C. 5021(b) provides as follows:

> **Certificate setting aside conviction.**
>
> * * * * *
>
> (b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

18 U.S.C. 5023(a) provides in pertinent part:

> **Relationship to Probation and Juvenile Delinquency Acts.**
>
> (a) Nothing in this chapter shall limit or affect the power of any court to suspend the

imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title [18 U.S.C. 3651–3656] * * * relative to probation.

18 U.S.C. 3651 provides in pertinent part:

Suspension of sentence and probation.

* * * * *

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

* * * * *

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *.

STATEMENT

Petitioners Durst and Rice pleaded guilty to obstructing the mails, in violation of 18 U.S.C. 1701 (A. 8, 21). Petitioners Blystone and Pinnick pleaded guilty to stealing property with a value of less than

$100 from a government reservation, in violation of 18 U.S.C. 661 (A. 12, 16). Petitioner Flakes pleaded guilty to theft of property belonging to the United States with a value of less than $100, in violation of 18 U.S.C. 641 (A. 26).[1]

Petitioner Durst was given a suspended sentence of six months' imprisonment and was placed on probation for three years under the Youth Corrections Act ("YCA"), 18 U.S.C. 5010(a); among other conditions of probation, he was ordered to pay a $100 fine and to make restitution in the amount of $160 (A. 8). Petitioner Rice was given a suspended sentence of six months' imprisonment and was placed on probation for two years under the YCA, 18 U.S.C. 5010(a), pursuant to the provisions of Pub. L. 94–233, 90 Stat. 230, 18 U.S.C. 4216, which permit sentencing of young adult offenders under the YCA in appropriate cases; Rice was ordered to pay a fine of $100 as a condition of his probation (A. 21). Petitioners Blystone and Pinnick were placed on probation for two years and one year, respectively, under the YCA, 18 U.S.C. 5010(a); both were ordered to pay fines of $100 as a condition of probation (A. 12, 16). Petitioner Flakes was placed on probation for one year under the YCA, 18 U.S.C. 5010(a), and ordered to pay a fine of $50 as a condition of probation (A. 26).

[1] Under the statutes that petitioners were convicted of violating (18 U.S.C. 641, 661, 1701), penalties of a fine or imprisonment, or both, can be imposed.

In each case, the guilty pleas were taken and the sentences imposed by a United States Magistrate. Petitioners appealed their sentences to the United States District Court for the District of Maryland, which consolidated the appeals and affirmed the sentences imposed by the magistrates, ruling that a fine may be imposed as a condition of probation under the YCA (A. 27–37). The district court reasoned that a fine is entirely consistent with the rehabilitative intent of the YCA, since the fine will "in many cases, stimulate the young person to mature" into a law-abiding citizen, by causing him to accept "responsibility for his transgression" (A. 35–36). It also noted that use of fines is consistent with the legislative intent of the Act, since Congress stated that it intended, in enacting the YCA, to leave the power to grant probation undisturbed, and since the general probation statute, 18 U.S.C. 3651, "fully authorizes the imposition of a fine, as well as restitution, when granting probation" (A. 36).

The district court also observed that if fines were precluded as a condition of probation under the YCA, the sentencing court would be limited, if it wished to impose a fine as a condition of probation, to sentencing a defendant under the adult probation provisions of Section 3651. As a result, the offender would be denied the advantage otherwise available under the YCA of having the conviction set aside and his record expunged through the procedure provided in Section 5021(b). Permitting this result

through "narrowly construe[ing]" the Act "would be inimical to the very persons that the Act was designed to protect" (A. 36–37).

The court of appeals affirmed in a brief opinion, on the authority of its earlier decision in *United States* v. *Oliver,* 546 F. 2d 1096, petition for writ of certiorari pending, No. 76–5632, stating "that the imposition of a fine as a condition of probation is consistent with the Act" (A. 45). The court of appeals also ruled that "[f]or the reasons expressed in *Oliver,* we believe that a requirement of restitution is also consistent" with the Act (*ibid.*).

The Fourth Circuit in *Oliver* had determined that precluding use of fines as a condition of probation "would not only be contrary to the literal wording of the statute, but would also diminish the liberal use of the probation alternative." 546 F. 2d at 1099. The court noted that the YCA "by its terms, does not prohibit the imposition of monetary fines, but only precludes the imposition of a prison sentence" (*id* at 1098). Then, relying on this Court's statement in *Dorszynski* v. *United States*, 418 U.S. 424, 436, that "[t]he legislative history [of the YCA] clearly indicates that the Act was meant to enlarge, not [to] restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort," the court concluded that "the denial of the power to impose a fine in connection with probation would not be consistent with [this] congressional intent" of "increas-

[ing] the alternatives a district judge may resort to" in sentencing youth offenders, but would instead "decrease, rather then increase, the alternatives." 546 F. 2d at 1099.

SUMMARY OF ARGUMENT

1. It is clear from both the language and the history of the Youth Corrections Act ("YCA") that Congress intended to leave unimpaired the pre-existing powers of federal judges to impose fines upon young persons convicted of federal criminal offenses, either in connection with a sentence providing for incarceration or, as here, in connection with imposition of a suspended sentence and probation. Similarly, federal courts retain the power to require a convicted youth offender to make restitution as a condition of probation (18 U.S.C. 3651).

The principal accomplishment of the YCA was to afford district judges a new and important option in sentencing young offenders—commitment to the custody of the Attorney General for treatment and supervision. Section 5010(b) and (c) expressly provide that this disposition, if selected, is "in lieu of the penalty *of imprisonment* otherwise provided by law" (emphasis supplied), but they contain no suggestion that fines are similarly displaced. In fact, the words "of imprisonment" were not contained in the statute as originally proposed to Congress by the Judicial Conference. They were subsequently added at the suggestion of the Attorney General, concurred in by the judges who had been active in formulating the

YCA proposal, for the express purpose of preserving the power to impose fines in conjunction with a YCA commitment.

It is not surprising that the same approach held true in connection with the YCA's treatment of probation for youth offenders. Section 5023 explicitly preserves the powers conferred on district courts by other provisions of Title 18 dealing with probation, which, of course, encompasses the power to impose fines and/or require restitution (18 U.S.C. 3651), and the legislative history of the YCA is replete with assertions that these powers were intended to be left absolutely undisturbed.

2. Those courts that have prohibited the imposition of fines in connection with sentences under the YCA have relied for that result principally upon the proposition that fines are punitive and therefore inconsistent with the Act's focus upon rehabilitation of youth offenders. The language and history of the YCA, discussed in Part I of the brief, make it clear that Congress thought otherwise.

Even if this dispositive evidence of Congressional intent were not available, the proposition that fines are inconsistent with the purposes of the Act could not be sustained. While it is true that the Act was designed to displace imprisonment of a youth as an adult offender in most cases, this was predicated largely on serious concern about the adverse consequences of incarceration of youth offenders together with hardened adult criminals, and one cannot extrapolate to the conclusion that all forms of "punish-

ment" were meant to be precluded. And even if purely punitive sentences were meant to be proscribed, fines are not solely punitive, but can often have strong rehabilitative and deterrent aspects as well.

Finally, any objection that fines are impermissibly punitive could not sensibly be extended to requirements that the convicted youth offender make restitution to his victim, and there is accordingly no basis whatsoever for barring that sentencing option. Petitioners' fear that the power to require restitution would be abused by federal judges intent upon imposing fines despite a lack of power to do so is utterly without foundation, particularly as restitution is limited by statute to the amount of the damage suffered by the victim of the crime.

ARGUMENT

I.

THE LANGUAGE AND HISTORY OF THE YOUTH CORRECTIONS ACT SHOW THAT YOUTH OFFENDERS MAY BE REQUIRED TO PAY FINES AND MAKE RESTITUTION

A. INTRODUCTION

The Youth Corrections Act expands the choices available in sentencing youth offenders—that is, persons under the age of 22 years at the time of conviction (18 U.S.C. 5006).[2] The Act was designed "to

[2] Young adult offenders, who have attained their 22nd birthday but not yet reached their 26th birthday at the time of conviction, may also be sentenced pursuant to the YCA, provided the court finds that there are reasonable grounds to believe that the young adult offender will benefit from YCA treatment (18 U.S.C. 4216).

provide a better method of treating young offenders convicted in federal courts * * *, to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. 424, 433. The YCA was modeled after a system of treatment of young offenders developed in England since 1894, known as the Borstal system, and was based on the theory that "the period of life between 16 and 22 years of age was found to be the time when special factors operated to produce habitual criminals." *Id.* at 432–433.

The Act was intended to improve upon the existing methods of treating criminally inclined youths by adding a new sentencing option: commitment of youth offenders to the custody of the Attorney General for individualized treatment. The youth is first sent to a classification center for study and then is either released under supervision or referred to the type of institution or agency—including training schools, hospitals, and forest camps (18 U.S.C. 5011)—"best suited to give him the type of training and treatment which the study at the classification center indicat[ed] should be provided." H.R. Rep. No. 2979, 81st Cong., 2d Sess. 3 (1950) (hereafter referred to as "House Report"). The offender is thereby provided tra[illegible] and guidance, as well as being "segregat[ed] * [illegible] insofar as practicable, so as to place [him] * * * with those similarly committed, to avoid the influence of association with the more hardened inmates serving traditional criminal sentences." *Dorszynski* v. *United States, supra,* 418 U.S. at 434.

The Act provides, in all, for four sentencing options. If the court is of the opinion that the offender does not need commitment, it may, pursuant to Section 5010(a), suspend the imposition or execution of sentence and place the youth offender on probation. Alternatively, if the offender is guilty of an offense punishable by imprisonment, the court may "in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision" pursuant to the YCA (Section 5010(b)). The youth offender must in that event be discharged unconditionally within 6 years from the date of his conviction. If, however, the court finds that the offender may not be able to derive maximum benefit from such treatment prior to the expiration of six years, it may, under Section 5010(c), "in lieu of the penalty of imprisonment otherwise provided by law," sentence the offender to the custody of the Attorney General for treatment and supervision for any further period authorized by law for the offenses of which he stands convicted (or until the earlier release provided for in the Act). Finally, if the court finds that the offender will not derive benefit from youth offender treatment under subsections (b) or (c), then Section 5010(d) authorizes the court to "sentence the youth offender under any other applicable penalty provision." [3]

[3] If the court is in doubt as to the appropriate sentence to impose, Section 5010(e) authorizes a 60-day commitment for observation and study.

B. FINES MAY BE IMPOSED IN CONNECTION WITH A CUSTODIAL COMMITMENT UNDER SECTION 5010 (b) AND (c)

While the various sections of the YCA nowhere explicitly mention fines and restitution—either to prohibit or to authorize such exactions—nevertheless it is clear from both the language and the history of YCA that the pre-existing power of the federal courts to fine youth offenders and to require them to make restitution was specifically and deliberately left unimpaired by Congress in its enactment of YCA.

As *Dorszynski* recognized in considering the extent of the obligation of a trial court to sentence a youth offender under the Act rather than to an ordinary sentence of imprisonment pursuant to Section 5010(d), "the Act was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion whether to employ the newly created options" (418 U.S. at 440). The new option added by subsections (b) and (c) of Section 5010—commitment to the custody of the Attorney General for treatment and supervision—is not a total substitute for all pre-existing sentencing options, but is afforded "in lieu of the penalty of imprisonment otherwise provided by law." The natural reading of this language is that the availability of the other penalties provided by law, notably fines, was intended to be left intact for youth offenders as for others convicted of crimes for which fines could by statute be imposed.

This reading is confirmed by the legislative history. The original draft of the YCA, prepared by the Ju-

dicial Conference, provided for the option of committing youth offenders to the custody of the Attorney General for treatment "in lieu of the penalty otherwise provided by law" (see *Federal Corrections Act and Improvement in Parole,* Hearings on H.R. 2139 and H.R. 2140 before Subcommittee No. 3 of the House Committee on the Judiciary, 78th Cong., 1st Sess. 3 (1943) (hereafter referred to as "House Hearings")). As so written, the statute would have substituted YCA commitment for any other form of punishment. By modifying the provision to apply in lieu of the penalty "of imprisonment" Congress evidenced its intent not to preclude fines. See *United States* v. *Oliver,* 546 F. 2d 1096, 1098 (C.A. 4); *Cramer* v. *Wise,* 501 F. 2d 959, 961 (C.A. 5) (dictum); but see *United States* v. *Hayes,* 474 F. 2d 965, 967 (C.A. 9).

This conclusion is confirmed by the history of the modification of the Judicial Conference draft to insert the words "of imprisonment." The change was made at the suggestion of Attorney General Biddle, who advised that the proposals he was transmitting had resulted from a conference among himself, the Director of the Bureau of Prisons, and the members of the Judicial Conference who had been active in proposing the YCA (House Hearings 110). In a letter to Congress, the Attorney General offered the following explanation of the need for this particular amendment (House Hearings 111):

> Sentence of the youth offender to the custody of the Authority should be a permissible alternative to a penalty of imprisonment otherwise provided by law but not to a penalty of a fine. It should, moreover, be possible for the court both to impose a fine and to sentence the offender to the custody of the Authority, where the law provides both fine and imprisonment as the penalties that may be imposed.

In view of the central role of the Judicial Conference in the framing of this legislation (see *Dorszynski* v. *United States, supra,* 418 U.S. at 432), it can reasonably be concluded that, when the Congress adopted this change in language, following review and approval of the proposed change by the judges active in formulating the YCA, it did so for the reasons advanced in the Attorney General's explanatory letter. It appears clear, therefore, that Congress intended to permit fines to be imposed in conjunction with sentencing to the custody of the Attorney General under Section 5010 (b) and (c).

C. FINES MAY BE IMPOSED AND RESTITUTIONS REQUIRED IN CONNECTION WITH A PROBATED SENTENCE UNDER SECTION 5010(a)

Since fines may be imposed under YCA upon youth offenders who are committed to custody pursuant to Section 5010(b) or 5010(c), as well as upon those who are sentenced as adults by virtue of Section 5010 (d), it would be most surprising if fines could not be levied upon youth offenders admitted to probation under Section 5010(a), as petitioners were. And, indeed, the option to impose fines upon and require restitution of convicted defendants admitted to pro-

bation is preserved in the YCA. Section 5023(a) specifically provides: "Nothing in [the Youth Corrections Act] * * * shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 [Sections 3651–3656] of this title * * * relative to probation." Under 18 U.S.C. 3651, one of the sections to which reference is made in Section 5023, a fine may be imposed as a condition of probation "in one or several sums," and as a further (or alternate) condition, the offender may be required to make restitution or reparation "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."[4]

The legislative history of Section 5023 confirms that Congress intended that the provisions of Title 18

[4] The YCA now contains some modifications to usual probation procedures, added in 1961 by the Act of October 3, 1961, 75 Stat. 750. That Act added a new subsection (b) to 18 U.S.C. 5021, providing that "[w]here a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction." Prior to this amendment, only the youth offender committed under Section 5010 (b) or (c) could be unconditionally discharged and have his conviction set aside. The amendment corrected this disparity by extending the same benefit to the youth offender who had been placed on probation. See H.R. Rep. No. 433, 87th Cong., 1st Sess. 1 (1961). There is no indication in the legislative history that this amendment was intended to accomplish any other alteration in the sentencing judge's authorities relating to probation.

dealing with probation would continue to apply to youth offenders sentenced to probation in the same manner as they had before enactment of the YCA. The House Report on S. 2609, the bill that became the YCA in 1950, states categorically (H.R. Rep. No. 2979, *supra*, at 3; emphasis supplied):

> Under [the bill's] provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. *Thus, the power of the court to grant probation is left undisturbed by the bill.*

See also identical statement by Judge Orie L. Phillips (House Hearings 31).

Similarly, during the House Hearings Judge Phillips, the chairman of the Judicial Conference committee that drafted the bill that led to the YCA, responded to Representative Cravens' inquiry whether the bill "in any way affect[s] the so-called probation system" as follows (House Hearings 37):

> Not at all. * * * [W]e found it was working well and concluded it ought not be disturbed. * * * It leaves [the probation system] absolutely undisturbed.

The same view was echoed in the testimony of Judge Hincks, another member of the Judicial Conference Committee, whose statement demonstrates the intent to retain the existing options with respect to probation and adult punishment, while simply adding by the Act a new option of commitment for treatment.[5]

Petitioners' bald assertion (Br. 7) that "the sentencing alternatives of the [YCA] * * * act as a substitute for the penalties set out in the statute under which the defendant is found guilty" is therefore simply not supported by either the language of the statute, which expressly preserves the probation provisions of Chapter 231, or by its legislative history. The YCA as originally enacted merely provided a substitute for the penalty of imprisonment as an adult offender, for use at the judge's discretion: commitment to the Attorney General for treatment. The judge could, however, also sentence the offender as an adult; the YCA did not "substitute" for this authority. Similarly, the probation authority was retained undiminished.

[5] Judge Hincks explained the purpose of the Judicial Conference proposal as follows (House Hearings 74–75):

"Under existing law (as indeed under the proposed bill) a judge can, when he thinks it wise, admit a youth offender to probation under a suspended sentence. Thus without title III a judge has ample power to make a lenient disposition of the case.

"And under existing law (as also under the proposed bill) the judge has ample power to sentence the youth offender as an adult and thus accomplish his confinement in a Federal reformatory or penitentiary where he will be in [the] company with upward of a thousand other inmates, some as old as 30, or in a local jail housing the sewage of local humanity. Thus without title III, the judge has power to make a drastic disposition of a case.

"But time and time again it has been my distressing experience to have to deal with a youth offender deserving neither the lenient nor the drastic treatment which alone is available. * * *

* * * * *

"Against this background, I feel that title III of the act [relating to youth offenders] will be a godsend to the judge as providing an

Petitioners further argue (Br. 7) that a fine can be imposed under the general probation statute, 18 U.S.C. 3651, only "when the statute under which the defendant is sentenced specifically provides for a fine" and that, since the YCA "makes no such specific provision, a fine is impermissible when an offender is sentenced under its provisions." This argument has as its premise petitioners' earlier assertion that the YCA acts as a substitute for all the penalties set out in the statute that the defendant is convicted of having violated. Since, however, this assertion is contradicted by both the language and the history of the statute, the entire argument must fail.[6] The YCA was not intended to replace the existing powers associated with imposition of probation, and therefore the usual procedures for admin-

ideal disposition for the usual youth offender. Under its provisions, he will get needed discipline and training with a minimum exposure to contaminating influences, and will be returned to his normal environment under experienced supervision as soon as the state of his character development shall warrant."

[6] In *Cramer* v. *Wise*, *supra*, 501 F. 2d at 962, in an opinion on which petitioners rely (Br. 10), the Fifth Circuit concluded (footnote omitted):

"* * * The provisions of 18 U.S.C. § 5010 (a), (b) [,] (c) and (d) are progressive in nature and exclusive of each other. It would seem illogical to conclude that these detailed provisions, so obviously exclusive of each other, are not so exclusive of provisions not contained within the Act [*e.g.*, *fines*] which the Act was designed to supplant."

We cannot agree that because the subsections of Section 5010 are "progressive," it follows that they are also exclusive of other provisions of law. The language of the statute simply does not support this reasoning. Subsection (d), for example, specifically requires reference to other provisions of law in fixing the sentence. And

istering probation are applicable, including the provisions of Chapter 231 relating to imposition of fines and restitution.[7]

II

NEITHER A FINE NOR RESTITUTION IS INCONSISTENT WITH THE REHABILITATIVE PURPOSES OF THE YOUTH CORRECTIONS ACT

1. Those courts of appeals that have held that fines and requirements of restitution are impermissible in the sentencing of a youth offender have not

subsection (a), through the operation of Section 5023, incorporates the variety of provisions in Chapter 231 relating to administration of probation. Indeed, reference to Chapter 231 is necessary in order to determine how probation under the YCA is to be administered, since Section 5010(a) provides no guidance in this regard. (For example, authority to arrest for violation of the conditions of probation (Section 3653); authority to revoke or modify any condition of probation (Section 3651); provision for release from liability upon having satisfied the terms and conditions of probation (Section 3651).)

[7] Petitioners suggest (Br. 8) that a recent case, *United States* v. *Coleman*, 414 F. Supp. 961 (D. Md.), holding that the special parole term imposed under 21 U.S.C 841(b)(1)(B) is inapplicable to an offender sentenced pursuant to Section 5010(b), is persuasive of the position that fines may not be imposed pursuant to Section 5010(a). That case is inapposite, however, because, as the court noted, the special parole term is to be added to "any sentence imposing a term of imprisonment," and thus by its terms does not extend to a sentence not relating to a term of imprisonment, such as sentence under Section 5010(b), which is "in lieu of penalty of imprisonment otherwise provided by law." 414 F. Supp. at 962–963. See also *United States* v. *Myers*, 543 F. 2d 721 (C.A. 9). The proper treatment of the special parole term, which by its terms is to be used only in conjunction with adult sentences of imprisonment, is therefore not instructive as to the correct treatment of fines.

done so on the basis of an analysis of the language and history of the pertinent specific provisions of the YCA discussed above, but rather as a result of the general conclusion that such exactions are inconsistent with the Act's focus upon rehabilitation of youth offenders. See *United States* v. *Bowens*, 514 F. 2d 440, 441 (C.A. 9); *United States* v. *Mollet*, 510 F. 2d 625, 626 (C.A. 9); *Cramer* v. *Wise*, *supra*, 501 F. 2d at 962, *United States* v. *Hayes*, *supra*, 474 F. 2d at 967.[8] *Contra*, *United States* v. *Hix*, 545 F. 2d 1247 (C.A. 9) (as to restitution); *United States* v. *Buechler*, C.A. 3, No. 76–2362, decided June 22, 1977. Petitioners too rely in large part upon the proposition that the rehabilitative goals of the YCA preclude the sanctions imposed upon them in this case (Br. 9–10).

This argument simply cannot survive the evidence of the legislative history. As we have shown (pp. 13–18, *supra*), Congress specifically amended the language originally proposed for subsections (b) and (c)

[8] In concluding that fines may not be imposed, *Hayes* relied on the authority of *United States* v. *Waters*, 437 F. 2d 722 (C.A. D.C.), which disapproved the combination of an adult sentence with the recommendation that the youth offender be placed in an youth facility. The *Waters* court stated (*id.* at 726) that "the statutory scheme does not envisage *this particular* combination of of rehabilitation and deterrence" (emphasis supplied). The case did not turn, as the Ninth Circuit suggested, on a broad principle that deterrent sanctions may not be applied to youth offenders—indeed, the *Waters* court noted that the enlarged sentence provisions of subsection (c) could properly be used to achieve this effect—but rather on the fact that a youth offender may not be given an adult sentence where, as here, the sentencing court apparently thought the youth would benefit from treatment under subsection (b) or (e).

in order to ensure that fines could be imposed on youths committed to the custody of the Attorney General under the Act. It also purposefully preserved the pre-existing sentencing options associated with probation. Congress, in short, must be deemed to have considered fines to be entirely consistent with the rehabilitative theory of the Act.

Even if this dispositive legislative history were not available, the proposition that fines are inconsistent with the intention of the Act could not be sustained. The Act was specifically directed at providing an alternative to one punitive program, imprisonment as an adult offender. True, the Act made imprisonment available only in those circumstances, presumably relatively infrequent, in which the sentencing judge finds that the offender will not benefit from commitment under subsection (b) or (c). See *Dorszynski* v. *United States, supra.* But one cannot extrapolate from the fact that imprisonment as an adult is not favored for youth offenders to the conclusion that all forms of "punishment" have been forbidden. This would require reading into the Act provisions that the Act does not contain, on a topic as to which it is silent.

It is by no means clear in any event that a fine should be labeled as punitive, since it has strong rehabilitative aspects as well. As the district court in this case stated (A. 35–36):

> [A] fine could be consistent * * * with the rehabilitative intent of the Act. By employing this alternative [of fine and probation], the sentencing judge could assure that the youthful offender would not receive the harsh treatment of incarceration, while assuring that the offender accepts responsibility for his transgression. The net result of such treatment would be an increased respect for the law and would, in many cases, stimulate the young person to mature into a good law-abiding citizen.

See also *United States* v. *Buechler, supra,* slip op. 9 and n. 4; *United States* v. *Oliver, supra,* 546 F. 2d at 1099 n. 3; *United States* v. *Prianos,* 403 F. Supp. 766, 769–770 (N.D. Ill.). As the district court suggests, the imposition of a fine can have pedagogic aims—for example, to teach the offender that his offense is a serious one, although in petitioners' cases not so serious as to warrant incarceration, or that he must think through, and accept responsibility for, the consequences of his actions. These lessons can be as rehabilitative in effect as any of the various other conditions of probation that can be imposed under the Act, such as that the offender obtain and keep employment. See *Driver* v. *United States,* 232 F. 2d 418, 421 (C.A. 4).[9] Therefore, even if Congress did intend to preclude punitive measures being taken as to of-

[9] It is significant that the federal probation system has provided for fines since its creation by statute in 1925, and yet this system is regarded as rehabilitative in its aim. As the House Report on the S. 1042, the bill that became the Probation Act of March 4, 1925, stated (H.R. Rep. No. 1377, 68th Cong., 2d Sess. 2–3 (1925)):

"Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders without the

fenders sentenced under subsection (a), (b) or (c) of Section 5010—an assertion in which we cannot concur—fines nonetheless are permissible as a condition of probation under the Act, since their punitive aspects are at least matched by their rehabilitative and deterrent uses.

2. The objections raised as to imposition of fines—that they are necessarily punitive and therefore inconsistent with the purposes of the YCA—cannot in any event be said to apply to restitution, which merely repays the victim for damage caused by the offender (18 U.S.C. 3651). Therefore, as the Third and Ninth Circuits have recognized (*United States* v. *Beuchler, supra; United States* v. *Hix, supra*) restitution is permissible as a condition of probation under the YCA.[10]

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hardship, the expense, and the risk of subjecting them to imprisonment. * * *

"* * * The probationer is encouraged in industrious, law-abiding habits * * *.

"* * * In many such cases, probation is not only the humane but the practical and effective treatment, avoiding the disgrace and stigma of a prison sentence."

[10] As the Third Circuit stated in *Beuchler*, after noting that it found the reasoning of *Oliver*, *supra*, and *Prianos*, *supra*, "most persuasive" and concluding that the probation provided for in Section 5010(a) "must be governed by the general probation provision, section 3651," which "expressly permits probation to be conditioned upon restitution and fines" (slip op. 8–9; footnote omitted):

"In our view, restitution is certainly not inconsistent with rehabilitative aims. * * * [T]he restoration of the proceeds of the crime, in and of itself, may be an expiatory act. As some commentators have observed, making amends by making restitution may prove to be just the catharsis that a youthful offender needs in order to regain the self-respect—or respect for others—that will enable him to respect the law thenceforth. In any event, the youth will have learned the first lesson that society—in its effort to rehabilitate *all* offenders—tries to teach: society, whenever it can help it, will not allow crime to pay."

Petitioners do not dispute that restitution cannot be categorized as punitive; rather, they argue (Br. 11) that a requirement of restitution should nonetheless not be permitted under the YCA because it may be used by sentencing courts to disguise impermissible fines. Petitioners' fear is without basis, since restitution is limited by the "actual damages or losses caused by the offense" (see 18 U.S.C. 3651) and must be justified, if challenged, on that basis. See *United States* v. *Clovis Retail Liquor Dealers Trade Assn.*, 540 F. 2d 1389, 1390 (C.A. 10), and cases cited therein; *United States* v. *Beuchler, supra,* slip op. 10–11.

Restitution is, moreover, permissible as a condition of probation not merely because it serves an educational and rehabilitative function consistent with the Act but because, as we have argued in Part I of this brief, the Youth Correction Act specifically authorizes its use in conjunction with the granting of probation. See 18 U.S.C. 5023(a) and 3651.

3. Finally, the result that petitioners seek would be counterproductive because it would materially limit the options available to sentencing judges in the case of youth offenders, contrary to the Congressional goal in enacting the YCA of expanding those options. If

petitioners are correct that the Act bars fines and restitution orders in conjunction with probation under Section 5010(a), then a judge who wishes to sentence a youth offender, such as one of the petitioners, to probation, and to impose a fine as a condition of probation in order to impress the youth with the seriousness of his offense, would be required to make a finding that the youth would not benefit from commitment under subsection (b) or (c), and then to sentence him as an adult offender under subsection (d). The youth offender would thereby lose the valuable benefit of being able to have his conviction set aside under Section 5021. In the alternative, the judge could, contrary to his considered judgment, sentence the offender to probation without a fine (or restitution), or impose the custodial sanction of Section 5010 (b) or (c), although he does not believe that to be truly necessary (see discussion at A. 36–37.)

For the reasons we have outlined, we do not believe that the Congress has thus impaired the sentencing judge's flexibility and reduced the potential and attractiveness of probation under Section 5010(a). See *United States* v. *Oliver, supra,* 546 F. 2d at 1099. Rather, as the court of appeals correctly determined in this case, fines and restitution can in fact be imposed, as appropriate, as a condition of probation under Section 50010(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
MARION L. JETTON,
Assistant to the Solicitor General.
JEROME M. FEIT,
MARSHALL TAMOR GOLDANG,
Attorneys.

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